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What Can Bankruptcy Law Tell Us about Article III and Vice Versa?

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WHAT CAN BANKRUPTCY LAW TELL US ABOUT ARTICLE III AND VICE VERSA?

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In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[1] the Supreme Court held that the bankruptcy code existing in 1978 was unconstitutional because it violated Article III of the United States Constitution. Article III states in relevant part that "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[2] It then sets forth the following requirements to help preserve the independence of the tribunals that will exercise this power: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[3] Because the bankruptcy judges under the pre-1978 system had rather broad jurisdiction over the legal issues they could adjudicate, but lacked Article III's protections, the Court held that the bankruptcy system improperly delegated part of the judicial power of the United States to non-Article III tribunals.[4]

Since *Northern Pipeline,* the United States bankruptcy system has undergone several major revisions, but this case provoked and continues to provoke a veritable mountain of commentary.[5] Most of the important issues raised by *Northern*

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1. 458 U.S. 50 (1982).
2. U.S. CONST. art. III, § 1.
3. *Id.*
4. *See Northern Pipeline*, 458 U.S. at 60-87.
5. *See, e.g.*, Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397 (1996); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW. U. L. REV. 1188 (1993); Maryellen Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOK. L. REV. 207 (1983);

Pipeline, such as the proper scope of bankruptcy court jurisdiction,[6] the proper scope of Article III,[7] and whether *Northern Pipeline* was itself decided correctly,[8] have in fact been discussed in sufficient detail that it would require a very good reason to revisit this case. This article argues that such a reason exists, both from the perspective of bankruptcy policy[9] and from the perspective of Article III.[10] It argues that *Northern Pipeline* reflected a critical assumption that has remained in the law to this day but is the undiagnosed source of several persistent problems, not only in the bankruptcy context but also in the Court's attempts to define the proper limits of federal court jurisdiction. The assumption in question is highly intuitive and rather harmless on its face: it is that the source of a legal right should play the central role in determining whether its adjudication will require an exercise of judicial power under

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Lawrence P. King, *The Unmaking of a Bankruptcy Court: Aftermath of* Northern Pipeline v. Marathon, 40 WASH. & LEE L. REV. 99 (1983); Kenneth T. Kristl, Note, *Limits on Legislative Court Judicial Power: The Need for Balancing Competing Interests:* Northern Pipeline Construction Co. v. Marathon Pipeline Co., 59 CHI. KENT L. REV. 873 (1983); Louis W. Levit & Richard J. Mason, *Where Do We Go From Here? Bankruptcy Administration Post-*Marathon, 87 COM. L.J. 353 (1982); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197; Jeffrey Gresham Tinkham, Comment, Northern Pipeline Construction Co. *and* Raddatz: *Clarification of the Article III Constraints on Article I Courts?*, 21 HOUS. L. REV. 397 (1984); John T. Kennedy, Note, Northern Pipe Line Construction Co. v. Marathon Pipeline Co.: *The Scope of Article I Court Jurisdiction: Abstract Principles or Practical Considerations?*, 10 OHIO N.U. L. REV. 311 (1983).

6. *See, e.g.*, Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule* Northern Pipeline, 65 AM. BANKR. L.J. 311 (1991); Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1 (1985); Philip J. Hendel & Joseph H. Reinhardt, *Attempting to Define the Scope of Bankruptcy Court Jurisdiction: No Miracle Drugs for the Patient*, 92 COM. L.J. 350 (1987); Anthony Michael Sabino, *Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of the Bankruptcy Court*, 21 SETON HALL L. REV. 258 (1991).

7. *See, e.g.*, Jeffrey H. Bush, *Toward a Theory of Public Rights: Article III and the Bankruptcy Amendments and Federal Judgeship Act of 1984,* 70 NEB. L. REV. 555 (1991); Mark V. Tushnet & Jennifer Jaff, *Why the Debate Over Congress' Power to Restrict the Jurisdiction of the Federal Courts is Unending*, 72 GEO. L.J. 1311 (1984); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV 581 (1985).

8. *See, e.g.*, Chemerinsky, *supra* note 6, at 311 ("It is time for the Supreme Court to recognize that *Northern Pipeline* was a mistake and to allow bankruptcy courts the authority accorded them under the 1978 Act.").

9. For the purposes of this article, the "bankruptcy policy perspective" will be defined as the perspective that is concerned primarily with utilitarian notions of efficiency and fairness.

10. For the purposes of this article, the "Article III perspective" will be defined as the perspective that is concerned primarily with protecting the independence of the federal judiciary and thereby also protecting a certain class of counter-majoritarian rights granted to individuals.

Article III, and thus whether tribunals adjudicating that type of right must meet Article III's other requirements concerning judicial independence. Because different rights warrant differing amounts of protection from majoritarian processes, this premise suggests that adjudication by an independent judiciary is most important with regard to rights derived from sources such as the Constitution, which are most removed from majoritarian processes. Rights deriving from state private or common law, from federal law, and finally, from broad regulatory or administrative schemes would seem respectively less and less likely to require exclusive Article III adjudication. In what follows, the premise that leads to this view will be referred to as the "sourcing premise."

A central goal of this article will be to expose some of the problems with the sourcing premise and resolve them by offering a view of rights that lends itself to a new approach to Article III. This article argues that the sourcing premise is problematic because it forces a choice between two clear evils: (1) undermining the rationale and effectiveness of bankruptcy law (in a manner that as shown below will also entail an unwarranted set of restrictions on the administrative state more generally), and (2) threatening the independence of the federal judiciary. Replacement of the sourcing premise can, however, alleviate the need to make this difficult choice. This article thus develops an alternative approach to Article III, on the theory that while rights function as trumps in our legal reasoning—by excluding certain classes of countervailing considerations from the processes of valid legal judgment, depending on the type of right in question[11]—the classes of considerations trumped should depend not only on the source of the right but on the context in which it is asserted.

The context in which a right is asserted can be important in one of two manners, which will be indicated in broad strokes here and elaborated further in the main sections of the article. First, the context can indicate something important about the class of considerations that the right properly excludes. Different classes are excluded depending on when a right is asserted. Second, features from the context can provide a sufficient reason for abrogating certain classes of rights. Because of the way rights function, consent from the relevant

11. The most famous and authoritative articulation of this view can be found in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

right-holder will also ordinarily rebut the presumption reflected in a right, and the law can furnish formal procedures for expressing the relevant types of consent. This article refers to this view as the "context-based" view of rights and presents an argument for adopting this view along with its associated approach to Article III.

This article is split into three sections. Section I provides the historical background to the relevant Article III and bankruptcy doctrines, up through and then continuing past *Northern Pipeline*. Section I.A discusses the bankruptcy code as it existed before 1978. It then describes how inefficiencies in this system made the system unviable from the perspective of social policy, thus leading to its ultimate revision. The section concludes by describing the new bankruptcy system that began in 1978.

Section I.B examines the Court's 1984 holding in *Northern Pipeline* that the bankruptcy code was unconstitutional under Article III. Section I.C, finally, describes several more recent developments in the law that should have bearing on Article III and on the proper scope of bankruptcy court jurisdiction. After describing Congress's reaction to *Northern Pipeline* and the present bankruptcy code, this section discusses two major shifts in the Court's Article III jurisprudence. In *Thomas v. Union Carbide Agricultural Products Corporation*[12] and *Commodity Futures Trading Commission v. Schor*,[13] respectively, the Court expanded the so-called "public rights" exception to Article III and replaced the traditional formalist test for Article III validity with a functionalist one.

Section II discusses the problems that these uncertain Article III and bankruptcy law doctrines have created and argues that a solution lies in a context-based approach to Article III. Section II.A explores the arguments that the present, revised bankruptcy code is unconstitutional, first under *Northern Pipeline* and then under the Court's revised Article III jurisprudence. The section then suggests that our present bankruptcy scheme is unviable from the perspective of social policy both because of its questionable constitutional pedigree and because it attempts to meet Article III's requirements by distinguishing between so-called "core" and "non-core"[14] matters

12. 473 U.S. 568 (1985).

13. 478 U.S. 833 (1986).

14. For a description of this distinction in the language of this statute, see *infra* notes 109-119 and accompanying text.

in a way that invites an unjustifiable amount of inefficiency. Section II.B, on the other hand, argues that any attempt to resolve these bankruptcy-related problems from within our existing approaches to Article III will seriously threaten the independence of the federal judiciary. Finally, Section II.C argues that this dilemma, which forces us to choose between an Article III jurisprudence that threatens the independence of the federal judiciary and one that undermines bankruptcy law and the foundations of the administrative state more generally derives from the fact that all of these approaches rely in one way or another on the sourcing premise. After exposing this premise, the section details an alternative, context-based approach to Article III.

Section III applies this new approach to several different areas of the law, beginning with bankruptcy in Section III.A. Under this new approach, *Northern Pipeline* was decided wrongly and bankruptcy courts should be given an expanded jurisdiction over both "core" and "non-core" matters. One initial advantage of this approach is that bankruptcy law could be made more efficient and thus more viable from the perspective of social policy. A second advantage is that this expansion would in no way threaten the importance and independence of the federal judiciary. Section III.B then applies this new Article III approach to military courts, territorial courts and courts that adjudicate "public rights," all of which have traditionally been viewed as warranting exceptions to Article III. By showing that a straightforward application of this new approach will yield exceptions in just these three cases, this article ends by suggesting that this approach offers us the elusive "unified approach to Article III" that has so often been sought by the courts.

Before proceeding, it is important to recognize, however, that the sourcing premise is no mere mistake or oversight. The premise finds its justification in a very powerful conception of rights and of the role that rights should play in the law and in the processes of valid legal reasoning. Under this view, rights with different origins should exclude different classes of considerations in our legal reasoning because different procedures of lawmaking respond to different normative aims in a constitutional democracy. Rights that originate in ordinary legislation are, for example, the product of deliberations by officials who are directly accountable to an electorate. Because ordinary legislation is passed by this sort of institution, it should

approximate the decision that most citizens would endorse. Familiar complications aside,[15] ordinarily legislation is thus well-suited to measure the intricacies of majoritarian impulses. Because the United States legal system also contains a well-developed conception of the rule of law, along with a deeply embedded inclination to treat like cases alike, rights that derive from ordinary legislation will, however, reflect broadly majoritarian concerns while sometimes departing from these concerns in the particular case.

This seemingly paradoxical structure is well-suited to reflect what is commonly called a "rule-utilitarian" conception of value. Whereas all forms of utilitarianism define the "good" as that which would generate the most happiness calculated across all relevant persons, and the "right" as that which would maximize this "good,"[16] rule-utilitarianism is special in recommending the adoption of those rules, rather than particularized acts, that will maximize welfare, even if some applications of the rules fail to meet this criterion.[17] Rule-utilitarianism thus best characterizes this first set of rights, which derive from rules with general application that are aimed at producing the highest satisfaction in the most citizens. If ordinary legislative processes produce rules that reflect this sort of aim, then the rights that derive from these legislative pronouncements would seem to require little insulation from majoritarian political processes.

A second class of rights is, by contrast, normally pictured as essentially counter-majoritarian. Rather than expressing the decision that would maximize the good of the whole, they express restrictions on that very type of calculation, restrictions structured to take account of the location of a decision's costs and benefits in persons and to place minimal constraints on how these allocations can be made with respect to each individual. These rights, which are "deontological" or "agent-centered"

15. Familiar complications include phenomena like low voter turn-out, the free-rider problem and the high incidence of special interest group lobbying. Defenders of this conception of ordinary legislation will, however, point out that accountability to an electorate should at least keep a check on these sorts of excesses. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17-23 (1962) (discussing how electoral accountability keeps democratic political processes in line with roughly majoritarian sentiment).

16. For a good discussion of the structure of utilitarian thought, see JOHN RAWLS, A THEORY OF JUSTICE 22-27 (1971).

17. *See, e.g.*, RICHARD B. BRANDT, MORALITY, UTILITARIANISM, AND RIGHTS 111 (1992).

rights, derive primarily from two sources: first, from the Constitution, which places constraints on majoritarian legislation through the institution of judicial review,[18] and, second, from the common law, which reflects many of the agent-centered features of common sense morality.[19] Because these rights trump the majoritarian elements of our legal reasoning, they require a tribunal insulated from ordinary political processes for their adjudication. Consequently, these rights are often viewed as falling squarely within the province of Article III courts, and the presumption that the source of a legal right should determine the institution that is right for its adjudication has deep roots in political theory.

This article will therefore attempt to demonstrate that a context-based view of rights also has ample, if less often cited, support in political theory. A second but equally important goal of this article will be to demonstrate how a better understanding of political philosophy, and of how concepts such as "right" actually operate in our ordinary moral practices, can help clarify the law.

I. HISTORICAL BACKGROUND

A. *The Pre*-Northern Pipeline *Era*

Before 1978, bankruptcy law was administered by a hybrid system consisting of Article III courts and more specialized Article I courts, commonly known as "referees."[20] Referees performed many of the same functions as Article III courts: for example, referees made factual determinations and adjudicated legal claims in a whole host of bankruptcy-related situations.[21] As noted above, however, Article III requires that all members

18. Alexander Bickel is famous for arguing that judicial review is undemocratic because of this counter-majoritarian aspect. *See* BICKEL, *supra* note 15. For some classic responses to Bickel's "counter-majoritarian difficulty," see BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991) (developing a "dualist" reading of the Constitution as a response); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (developing a "process-based" response to the counter-majoritarian difficulty).

19. Elizabeth Anderson has commented on this aspect of our common sense morality. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993) ("Another set of intuitions deeply entrenched in commonsense practices concerns practical principles known as agent-centered restrictions.").

20. *See generally* Bankruptcy Act of 1898, ch. 541, §§ 33-39, 30 Stat. 544, 555-56 (codified with amendments at 11 U.S.C. §§ 66, 67 (1976) (repealed 1978)).

21. *See* Bankruptcy Act of 1898, ch. 541, § 39, 30 Stat. at 555-56.

of the federal judiciary remain tenured and maintain protections against salary diminution,[22] and referees had neither of these guarantees. Still, litigants could appeal adverse referee decisions to district courts,[23] and district courts were given the plenary power to withdraw any matter from referee supervision.[24] This section describes the pre-1978 code and how its inefficiencies ultimately led to an overhaul of the bankruptcy code in 1978.

For the purposes of this article, the most significant feature of the pre-1978 code was that it divided all bankruptcy actions into "summary" and "plenary" matters and parceled out referee jurisdiction on the basis of this distinction.[25] By the definitions provided in the code, "summary" matters involved the distribution of property in the actual or constructive possession of the court[26]—which was, in practice, limited to the distribution of property actually held by the debtor, rather than by third parties[27]—while "plenary" matters involved disputes relating to the same facts but that arose with, or between, third person parties with actual possession of the relevant property.[28]

Although bankruptcy referees were granted automatic jurisdiction over all summary matters, they could obtain jurisdiction over plenary matters only with the consent of the involved parties.[29] This system thus gave Article III courts automatic jurisdiction over claims that arose in the bankruptcy context but that were unrelated to disputes that could be remedied by reorganizing the possessions of the primary bankruptcy parties. Article I referees, on the other hand, maintained automatic jurisdiction over the remaining summary matters, even if the legal basis of the claims arose from somewhere outside of the bankruptcy code.[30] Importantly, the

22. *See* U.S. CONST. art. III, § 1.

23. *See* Bankruptcy Act of 1898, ch. 541. § 38, 30 Stat. at 555.

24. *Id.*

25. For a good overview of this distinction, see 1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D §§ 4:1(E)-4:2 (1998).

26. The Bankruptcy Act of 1898, ch. 541, § 2(7), 30 Stat. at 546, authorizes bankruptcy referees to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

27. *See* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten* Calloway v. Benton *Case*, 72 AM. BANKR. L.J. 1, 23-24 (1998).

28. *See* Bankruptcy Act of 1898, ch. 541, § 2(6), 30 Stat. at 546.

29. *Id.* at § 38, 30 Stat. at 555.

30. *See* 1 COLLIER ON BANKRUPTCY ¶¶ 1.01[1][a][ii], 1-05[1][b][2] (15th ed. rev.

constitutionality of the pre-1978 code was never successfully challenged on the ground that it violated the appropriate delegation of powers among the federal branches of government.[31]

The summary/plenary distinction was important for the development of modern bankruptcy law for the rather paradoxical reason that it generated a host of inefficiencies that made the pre-1978 system untenable from the perspective of social policy.[32] As it turned out, clear cases of plenary claims arose commonly in actual reorganizations and dissolutions,[33] and, because the status of a claim as plenary or summary could sometimes depend on how the claim was framed, a large number of claims either held an ambiguous status or could be made to hold one through artful pleading. By withholding their consent or by litigating the summary/plenary distinction itself,[34] parties with claims that lay in or near the plenary jurisdiction of the bankruptcy courts could therefore attempt to shop forums on many of their claims and engage in substantial tactical delay. By splitting their claims into different forums, parties could also increase the externalities of the overall proceedings and diminish the overall resources to be split between the relevant creditors. There are, however, by definition scarce resources in

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1998).

31. *See* Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 104 (1994).

32. *See* LAWRENCE P. KING & MICHAEL L. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION AND BANKRUPTCY 691 (3d ed. 1997).

33. As one treatise has stated:

> Under the jurisdictional structure created by the 1898 Act, there were many disputes involving debtors and debtor estates that fell outside the jurisdiction of the courts of bankruptcy, making it necessary for debtors and trustees to initiate plenary lawsuits in non-bankruptcy federal or state courts. Such plenary litigation, absent consent, was required in order to recover property of the estate that was held under a more-than-colorable claim by a third party having possession of it. Because of the limited scope of "summary" jurisdiction, absent consent, even claims arising under provisions of the bankruptcy laws, such as proceedings to recover fraudulently transferred property or to avoid preferential transfers, were not assertable under the 1898 Act in a court of bankruptcy, but had to be asserted in a state or federal court having jurisdiction other than under the federal laws establishing bankruptcy jurisdiction.

1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 4:2 (1998).

34. "This bifurcated jurisdictional system resulted in litigation concerning whether a particular matter could be litigated in the bankruptcy court or if it required a plenary forum." Johnathan L. Flaxer, *Bankruptcy Court Power to Adjudicate Contract Disputes*, 2 AM. BANKR. INST. L. REV. 369, 372-73 (1994).

the bankruptcy context.[35] The system thus created incentives for parties to bargain to keep a bad situation from getting even worse, and gave unfair advantages to parties who were especially wealthy or litigious and could increase their bargaining positions at the creditor meetings by threatening to litigate either the summary/plenary distinction or at least their plenary claims in other forums. In sum, the pre-1978 code created incentives to diminish rather than replenish, or properly allocate, scarce resources, and did so in a context of relative scarcity. The pre-1978 code also put certain types of creditors at an unfair advantage at the creditor meetings. Overall, this system thus made it difficult for bankruptcy proceedings to meet the paradigmatic efficiency and fairness concerns that are inherent in bankruptcy policy.[36]

In response to these problems, Congress began a decade-long examination of the bankruptcy code in 1968,[37] which ended with the passage of the Bankruptcy Reform Act of 1978.[38] Structurally, the Act made two main alterations to the bankruptcy system. First, in an attempt to resolve some of the efficiency problems mentioned above,[39] it eliminated the plenary/summary distinction altogether and granted bankruptcy courts broad, automatic jurisdiction over both sorts of claims.[40] In practice, this meant that bankruptcy courts had jurisdiction over almost any proceeding that bore a substantial relation to the facts in question in the reorganization or dissolution, whether the source of the claim came from bankruptcy law or

35. *See* Zimmerman v. Continental Airlines, 712 F.2d 55, 58 (3d Cir. 1983) (referring to "[t]he economic fragility of the bankrupt's estate").

36. *See* Hon. Leif M. Clark & Douglas E. Deutsch, *The Delaware Gap: Exposing New Flaws in the Scheme of Bankruptcy Referrals*, 5 AM. BANKR. INST. L. REV. 257, 292 n.137 (1997) (The "'summary/plenary' bifurcation of bankruptcy jurisdiction . . . was viewed as a principle contributor to the inefficiency of the bankruptcy laws under the [1898] Bankruptcy Act.")

37. *See Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., at 1 (1968).

38. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 28 U.S.C. (1978) (repealed 1984)).

39. "[B]ecause of the manner in which bankruptcy jurisdiction was defined and exercised, *viz.*, the 'plenary'/'summary' dichotomy, the system was prevented from operating efficiently. This was a major motivation behind the Bankruptcy Reform Act of 1978." 1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 1:4 (1998).

40. *See Northern Pipeline*, 458 U.S at 54 (stating that jurisdiction created by 1978 Reform Act is much broader than that exercised under former referee system, and that the Act eliminated distinction between "summary/plenary" distinction by conferring "related to" jurisdiction to bankruptcy courts).

some other source, such as state or common law, and whether the claim involved an unmediated creditor-debtor dispute or depended on judgments concerning property in the possession of third-person parties.[41] Second, the Bankruptcy Reform Act of 1978 transformed the highly interrelated referee-district court system into a more divided one, which consisted of district courts and more fully self-sufficient bankruptcy panels.[42] These panels were set up as discrete adjuncts to the district courts in each district and were given the power not only to hold jury trials[43] but also to issue final orders,[44] declarations, injunctions and any other writs necessary to carry out their enumerated bankruptcy tasks.[45] This second alteration was meant to help unify bankruptcy proceedings into one basic forum and prevent the related incentives to forum shop.[46] Although litigants maintained a right of appeal to the relevant district court in these cases, all issues related to the factual disputes between creditors and the party undergoing reorganization would be decided in the first instance by an independent bankruptcy panel, even if it meant deciding issues concerning third parties and creditors and even if the source of the legal claim lay outside of bankruptcy law.[47]

The Bankruptcy Reform Act of 1978 worked about as well as anyone could expect in terms of relieving bankruptcy cases of the inefficiencies produced by the earlier code.[48] The new

41. *See* 28 U.S.C. § 1471(b) (Supp. IV 1980) (providing that bankruptcy courts "have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [the Bankruptcy title] or arising in *or related to* cases under title 11") (emphasis added).

42. *See generally* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 2D § 3926 (1996).

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Ricardo Cordeo, Annotation, *Venue Provisions of National Bank Act (12 U.S.C.A. § 94) as Affected by Other Federal Venue Provisions and Doctrines*, 111 A.L.R. FED. 235, 280-81 (1993) ("Congress' clear intent in enacting the Bankruptcy Reform Act of 1978 was to facilitate the convenient, expeditious, and centralized handling of bankruptcy cases and related litigation. Section 241(a) of this Act . . . set forth the provisions of 28 U.S.C.A. § 1471, which granted a broad, unitary jurisdiction upon the Bankruptcy Court, and the legislative history amply evidences Congress' belief in a need for special venue rules in bankruptcy cases to complement this expanded jurisdiction and to promote centralization of related litigation.") (citing *In Re* Dean Ford, Inc., 38 B.R. 4 (Bankr. N.D. Ga. 1982)).

47. *See* Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 57 (1982).

48. *See* S. Rep. No. 95-989, at 49 (2d Sess. 1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835; H.R. Rep. No. 95-595, at 340 (2d Sess. 1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (noting the efficient "orderly" design of bankruptcy).

bankruptcy judges, however, appeared to hold a more problematic status with regard to Article III than their predecessors. These new judges were much like Article III judges in that they were appointed by the President with the advice and consent of the Senate,[49] and had jurisdiction over many paradigmatic non-bankruptcy claims,[50] which would ordinarily be considered Article III claims. In terms of constitutional guarantees, however, these new judges resembled their non-Article III predecessors: they were limited to fourteen-year terms,[51] they were subject to removal for certain enumerated causes including incompetence[52] and their salaries were left wholly unprotected from congressional alteration.[53] In effect, the Act appeared to grant bankruptcy judges the power and jurisdiction of an Article III court while leaving them dependent on the legislative branch for their employment and salary. By doing so, the Act created a bankruptcy system that would appear ripe for constitutional criticism under the Court's Article III jurisprudence.

B. The Northern Pipeline *Challenge*

In 1982, the Supreme Court entertained an Article III challenge to the existing bankruptcy code in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[54] The case involved the reorganization of a debtor who filed for Chapter 11 under relatively unexceptional circumstances.[55] Two months after filing, the debtor tried to incorporate several new suits against one of its creditors.[56] From the bankruptcy perspective, these suits were unorthodox because they involved third-party counterclaims for breach of contract, breach of warranty, misrepresentation, coercion, and duress,[57] all of which arose from state common law rather than from the federal bankruptcy code.[58] The case thus afforded the Court with a prime

49. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 28 U.S.C. § 151 (1978)) (repealed 1984).

50. *See* 28 U.S.C. § 1471 (1978) (repealed 1984).

51. *See id.* at § 153(a).

52. *See id.* at § 153(b).

53. *See id.* at § 154.

54. 458 U.S. 50 (1982).

55. *See id.* at 56.

56. *See id.*

57. *See id.*

58. *See id.* at 84.

opportunity to examine the constitutionality of the bankruptcy courts' new jurisdiction. This section examines *Northern Pipeline* and describes the uncertain legacy it generated with respect to Article III and the proper scope of bankruptcy court jurisdiction.

As stated above, the central issue in *Northern Pipeline* derived from the fact that the debtor was attempting to incorporate state law claims into the bankruptcy proceedings. All the parties agreed that by its letter, the 1978 code granted bankruptcy courts expanded jurisdiction over these sorts of claims, with or without the parties' consent.[59] The creditor was therefore forced to argue that this expansion violated constitutional, rather than statutory, norms.[60] Taking this basic tack, the creditor argued that by expanding bankruptcy jurisdiction to include state law counterclaims, the Bankruptcy Reform Act of 1978 effectively conferred a part of the "judicial power of the United States"[61] on judges who lacked both life tenure and protection against salary diminution. On the creditor's account, this conferral thereby violated Article III of the United States Constitution,[62] and the creditor moved to dismiss these claims from the bankruptcy proceedings altogether.

Although the bankruptcy court made short shrift of the creditor's motion,[63] the higher federal courts quickly recognized that there were important issues at stake. The district court in fact reversed on the strength of the creditor's Article III claim. In coming to its holding, the court cited fundamental constitutional values as well as broad structural concerns for the appropriate checks and balances and a proper distribution of power among the federal branches of government. The Supreme Court then indicated just how important the issue was by granting certiorari to hear the case.[64] At this stage, the United States filed an amicus curiae brief and joined the debtor in defending the 1978 code from this seemingly unprecedented challenge.[65] The importance of this case to all the parties is

59. *See id.* at 84.
60. *See id.* at 52.
61. *Id.* at 62
62. *See id.* at 57.
63. *See In re* Northern Pipeline Constr. Co., 6 B.R. 928 (Bankr. D. Minn. 1980).
64. *See* Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 454 U.S. 1029 (1981).
65. *See* Brief for the United States as Amicus Curiae, First English (No. 85-1199)

best explained by noting that it presented a nexus where fundamental ideological concerns came into conflict. Concerns for the independence of the federal judiciary and for the rights of creditors in situations where debtors are at or near insolvency came head-to-head with concerns about the legitimacy of granting the authority to adjudicate legal issues to non-Article III tribunals and about the proper strength and scope of the modern administrative state.[66]

1. The Majority's Approach

Ultimately, the majority issued an opinion that is famous not only for affirming the unconstitutionality of the 1978 code[67] but also for instating a highly general and formalistic approach to Article III's "judicial power" clause.[68] Under this approach, whether a decision requires an exercise of judicial power should be decided by applying a set of formal criteria to the decision in question, and any such decision must, as a general rule, be vested in a court system that meets Article III's requirements.[69] Although there are some exceptions to this rule, exceptions are warranted only when generated by the Constitution or by prolonged historical consensus.[70]

Technically, the Court discussed the substance of this approach in two separate sections. First, the Court discussed the circumstances under which Congress can create legislative courts pursuant to one of these alleged exceptions to Article III.[71] Second, the Court discussed the circumstances in which a hybrid system of Article III courts and Article I adjuncts meets Article III's requirements.[72] It is important to note, however, that these two inquiries are analytically indistinguishable: both answer part of the question of when adjudications can be performed in forums that are partly or completely independent of Article III protection. The majority's opinion is thus best viewed as an inquiry into the circumstances in which Article III allows non-Article III courts to perform various adjudicatory

(capitalization altered).

66. *See In re Northern Pipeline*, 6 B.R. at 929-30.

67. Pub. L. No. 95-598, 92 Stat. 2549 (codified at 28 U.S.C. §§ 151-60 (repealed 1984)).

68. *See Northern Pipeline*, 458 U.S. 50.

69. *See id.* at 56-60.

70. *See id.* at 64, 70.

71. *See id.* at 63-76.

72. *See id.* at 76-87.

functions.

In addressing the so-called "exceptions" to Article III—*i.e.*, at the "first stage" of the analysis—the Court took a historical approach and relied heavily on the fact that Congress has always been able to create only three distinct types of legislative courts: territorial courts, military courts and courts that adjudicate "public rights."[73] Although the Court did not define "public rights" in its opinion, it explained that at minimum these rights must involve disputes where the government is a party.[74] The Court cited a sovereign immunity rationale for this exception, explaining that because the federal government has this immunity, but can consent to be sued, Congress should be able to create legislative courts to adjudicate public rights pursuant to its right to attach conditions to its consent.[75]

After outlining these three exceptions, the Court noted that bankruptcy courts are neither territorial courts nor military courts[76] and then rejected the contention that they adjudicate only public rights in the sense under discussion.[77] The Court reasoned that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights such as the right to recover contract damages . . . . The former may well be a 'public right,' but the latter obviously is not."[78] On the basis of this reasoning, the Court rejected the contention that bankruptcy courts of the post-1978 variety could be created pursuant to Congress's exceptional power to create Article I legislative courts.[79]

Before proceeding to the second portion of the Court's analysis, it is important to note that there are already several problems with the Court's reasoning. First, the Court failed to explain why these three exceptions are warranted in the first place. Although the Court alludes to the notion that the exceptions are warranted by history and the Constitution,[80] the constitutional—*i.e.*, the Article III—question is exactly what was

73. *Id.* at 63-71.

74. *See* Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 69-70 (1982) (citing *Ex Parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

75. *See id.* at 67-68 (citing Crowell v. Benson, 285 U.S. 26, 50 (1932)).

76. *See id.* at 71.

77. *Id.*

78. *See id.*

79. *See id.*

80. *See id.* at 70.

at issue in this case. Consequently, all that is left of the Court's explanation is a cursory allusion to history. In its discussion of history, however, the Court failed to account for why the traditional exceptions to Article III were made in the precise circumstances cited. In the absence of such an account, it is unclear whether the rationale underlying these three exceptions might not apply to bankruptcy courts as well.

Moreover, to the extent that the Court did indicate a method of distinguishing between Article I and Article III jurisdiction on a principled basis,[81] it did so in a way that not only seems untenable but that the Court itself failed to employ consistently. As shown above, the Court failed to give a rationale that might warrant the three exceptions it discussed in a unifying manner. It did, however, spend some time discussing the alleged rationale behind the public rights doctrine,[82] and one might therefore try to generate a more satisfying account by elaborating on this rationale. If Article I adjudication were to follow from the fact that the government's sovereign immunity allows it to attach conditions to its consent to be sued,[83] the government would, however, be able to evade *all* constitutional challenges brought in Article III forums. This result not only seems counterintuitive in light of the central role that the federal judiciary is normally thought to play in protecting the Constitution, but it ignores the fact that our present law expressly provides for vehicles through which citizens can sue the state, even if sometimes in a fictionalized form.[84]

Further problems come from other quarters. In discussing the public rights doctrine, the Court suggested that while state and common law claims are private rights, the restructuring of

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81. *See id.* at 67-70.

82. *See id.*

83. *See id.* at 67.

84. In particular, the present law under *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny creates a series of legal fictions that allow aggrieved parties to sue the state in an Article III court by suing a state official in her official capacity. This phenomenon has been described quite aptly by one author as follows:

> The doctrine of *Ex parte Young* . . . relies on legal fiction when suits are brought against state officials to overcome this paradox. This legal fiction allows a court to recognize an official's unconstitutional conduct as state action for purposes of the Fourteenth Amendment, while simultaneously concluding that the action is "not attributable to the State for purposes of the Eleventh [Amendment]." By adopting this legal fiction, the *Young* Court held that the suit against the Attorney General was not against the State.

Nathan C. Thomas, Note, *The Withering Doctrine of* Ex Parte Young, 83 CORNELL L. REV. 1068, 1078-79 (1998) (footnotes omitted) (brackets in original).

creditor-debtor relations may be "public rights" by virtue of their content alone.[85] This suggestion would allow for a class of "public rights" to exist even when the government is wholly uninvolved in the proceedings, and would thus conflict with the cited sovereign immunity rationale for this exception. Finally, contrary to its particular conception of sovereign immunity, the Court suggested that the rights at issue in *Northern Pipeline* were private rights not because there was no governmental party involved, but because the rights were "state-created."[86] If rights are considered private merely because they are created by a state, however, the government would be forced to litigate its disputes with citizens over all these rights in Article III tribunals, with or without the government's consent. Again, this conclusion would conflict with the Court's sovereign immunity rationale for the public rights doctrine.

For all these reasons, the Court's holding is inconsistent with the only rationale given for a division between Article I and Article III jurisdiction. These facts should cast some doubt on the proposition that bankruptcy jurisdiction of the 1978 variety must be limited to "public rights" as defined by the Court.

In the latter half of its substantive discussion, the majority discussed the possibility that Congress might control the processes by which a right is adjudicated pursuant to its Article I powers to create rights in general. The majority rejected the broad view that Congress can wholly remove a concern from Article III jurisdiction any time Congress can create a right.[87] The Court explained, quite rightly, that this broad view would effectively eviscerate Article III's separation of powers and impartiality concerns.[88]

Nevertheless, the Court conceded that where Congress can create a right, it should also have some greater measure of control over the procedures used to adjudicate it.[89] Granting that in these sorts of cases Congress might distribute jurisdiction in the first instance to a tribunal that lacks Article III protections, so long as there is review by an Article III court, the Court articulated a set of indicia that hybrid Article I/Article III systems should meet in order to guarantee that the "essential

85. *See* Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 71 (1982).

86. *Id.*

87. *See id.* at 80-81.

88. *See id.* at 80.

89. *See id.* at 83-84.

features of judicial power" still vest in the federal judiciary.[90] These indicia include: the power of the Article III court to review under a *de novo*, as opposed to a clearly erroneous, standard, its ability to rehear evidence, its maintenance of appointment and removal powers over the Article I officers, limitations on the extent of the subject matter jurisdiction delegated to the Article I tribunals, limitations on their jurisdiction to factual inquiries and limitations preventing the Article I tribunals from presiding over jury trials or issuing enforceable orders or sanctions.[91]

Under this standard, the 1978 code had three main problems. It allowed for review only under a clearly erroneous standard, it delegated a large band of jurisdiction to bankruptcy courts, and it allowed bankruptcy courts to exercise all of the ordinary powers of district courts, such as the power to preside over juries and issue enforceable orders and sanctions.[92] Because the 1978 bankruptcy system placed these "essential attributes of judicial power" in non-Article III tribunals, the Court held that the regime was unconstitutional.[93]

In the end, the Court thus formulated a test that required courts to look first at the source of a right in question. If the right was derived from the United States Constitution or state law, it was to be adjudicated by an Article III court in the first instance. If the right was created by Congress, however, then the test required courts to apply a general formula for determining when the "essential attributes of the judicial power" were maintained in an Article III court. Finally, regardless of the source of the right, the Court made three exceptions to Article III for military courts, territorial courts and courts limited to adjudicating public rights.[94]

By splitting its opinion into two sections, however, the Court failed to see the internal inconsistencies in its approach to Article III. For example, although Article III's language is broad and appears to allow for no exceptions, and although the Court refused to allow the many instances of administrative agencies that had grown up since the New Deal to warrant exceptions to Article III,[95] the Court still read "history," in the limited sense of

90. *See* Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 84-86 (1982).

91. *See id.* at 84-87.

92. *See id.* at 85.

93. *Id.* at 84-85.

94. *Id.* at 64-70.

95. *See generally* Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S.

traditions in place at the nation's founding, to warrant three exceptions.[96] The standard rationale for this sort of exception is that once a historic practice has survived long enough, it should be deemed to have been granted tacit acceptance by virtue of not being overturned.[97] It is, however, difficult to see how this rationale could be used to usefully distinguish between the founding and much of our later historical practice. Moreover, the formalistic test employed by the Court yielded the counterintuitive result that even if a hybrid system were to retain all the "essential attributes of Article III," it could be deemed unconstitutional simply because the source of the right was the Constitution or state law, rather than ordinary federal legislation. The most telling failure lay, however, in the fact that the Court failed to provide an account of Article III that would simultaneously explain why the historical exceptions it allowed were justified, why the source of a right is important for the constitutional inquiry, and why the Court's formalistic approach to Article III preserves the meaning and purpose of the clause. The Court failed, in other words, to provide a unified account of Article III.

2. *The Approach in Justice White's Dissent*

Justice White pointed out this failure in his dissent and challenged the Court to articulate a more general, principled framework for determining when non-Article III courts can adjudicate Article III claims.[98] Noting that the practice of using administrative courts had become widespread since the rise of the New Deal, he suggested that the Court take a more case-by-case balancing approach to analyzing these sorts of

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50, 52-89 (1982).

96. *See id.* at 70 n.25.

97. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.") (White, J.).

98. Justice White wrote:

> Instead of telling us what it is Art. I courts can and cannot do, the plurality presents us with a list of Art. I courts. . . . Without a unifying principle, the plurality's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Art. I courts or adjuncts to Art. III courts. But we need to know why bankruptcy courts cannot qualify as Art. I courts in their own right.

Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 105 (1982) (White, J., dissenting).

arrangements.[99] Under Justice White's view, after looking to the source of the right, if a court finds a seeming violation, the court should determine how significantly the given arrangement disturbs the purposes of Article III and whether Congress's reasons for allocating power in that manner were strong enough to outweigh these Article III values.[100]

Although Justice White was willing to give Article III concerns ample weight, he would have thus submitted them to an essentially utilitarian calculus, and it is probably this fact that kept some of the other judges from joining his dissent. Still, in the ensuing years, Justice White's dissent became an important voice for the efficiency and strength of the administrative state.[101] In applying his alternative approach to the case at hand, Justice White reasoned that in the bankruptcy context, where particular claims are likely to be of low political interest, appellate review should significantly alleviate any Article III concerns about the constitutionality of more expansive bankruptcy court jurisdiction.[102] Justice White would therefore have upheld the 1978 scheme.[103]

C. Recent Developments

After issuing its opinion in *Northern Pipeline*, the Court stayed the decision until October 1982 in order to give Congress some time to remove the jurisdictional problems exposed in the existing bankruptcy code.[104] Congress failed to perform this task in time, however, and although the Court issued a second stay of its opinion until Christmas Eve, 1982, Congress once again failed to remedy the situation in time.[105] Given the growing crisis and backlog of bankruptcy cases, the Judicial Conference of the United States generated an Emergency Rule,[106] which was quickly adopted by each circuit, and which reinstated a rough analogue of the pre-1978 bankruptcy

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99. *See id.* at 113.

100. *See id.* at 113-16.

101. *See* Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19 (1993).

102. *Northern Pipeline*, 458 U.S. at 116-118 (White, J., dissenting).

103. *Id.* at 113-16.

104. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 38 (1995).

105. *Id.*

106. Emergency Rule, *reprinted in* 1 COLLIER ON BANKRUPTCY ¶ 3.01[2][b][ii] n. 15 at 3-9 to 3-12 (15th ed. rev. 1998).

panels.[107] To ensure the constitutionality of this order, the Judicial Conference built on the *Northern Pipeline* majority's language concerning "the essential attributes of judicial power";[108] it also followed the majority in distinguishing between "core" and "non-core" bankruptcy matters.[109] For better or worse, this emergency rule eventually hardened in its essentials into our present bankruptcy code, thus replacing Congress' laborious ten-year project to renovate the bankruptcy system in light of its many efficiency problems.[110] This section describes the essential features of our present bankruptcy code and then elaborates on several post-*Northern Pipeline* developments in the Court's Article III jurisprudence that bear on the code's constitutionality.

The most important alteration in bankruptcy law that Congress made in response to *Northern Pipeline* was to instate what is now known as the "core/non-core" distinction. Under the present code, bankruptcy panels still retain broad jurisdiction over (1) "all cases under title 11" and (2) "all civil proceedings arising under title 11, or (3) arising in *or related to* cases under title 11."[111] (The last class contains claims such as state law counterclaims.)[112] These claims are also categorized as "core" and "non-core" matters, with non-core matters encompassing those matters that are only "related to" Title 11 and core matters encompassing those that are under or arise under Title

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107. *See* RICHARD I. AARON, BANKRUPTCY LAW FUNDAMENTALS § 3.01[3]-[4] (1998).

108. *See generally* Emergency Rule, *reprinted in* 1 COLLIER ON BANKRUPTCY ¶ 3.01[1][b][vi], at 3-17 (15th ed. 1991); *see also* Jeffrey T. Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 AM. BANKR. L.J. 109, 118 (1989).

109. *See* Ferriell, *supra* note 108, at 118.

110. *See* 130 CONG. REC. H6241 (daily ed. March 21, 1984) (statement of Rep. Kastenmeier) ("The solution offered by my amendment has been at work in the last 18 months under the emergency bankruptcy rule . . . Congressional enactment of the [emergency] rule is the purpose of my amendment, and that is all that is necessary."); 130 CONG. REC. H1847-H1848 (daily ed. March 21, 1984) (statement of Rep. Kindness); 130 CONG. REC. H1849 (daily ed. March 21, 1984) (statement of Rep. Kastenmeier); 130 CONG. REC. H20224 (daily ed. June 29, 1984) (statement of Rep. Rodino) ("The conferees adopted most of the provisions creating this new Bankruptcy Court arrangement that were contained in the bill passed by this body."); 129 CONG. REC. S9921-23 (daily ed. April 27, 1983) (statement of Sen. Thurmond) (stating that Senate passed bill governing, among other things, Bankruptcy Court jurisdiction patterned after Emergency Rule); 129 CONG. REC. S9923-24 (daily ed. April 27, 1983) (statement of Sen. Heflin) (same); 129 CONG. REC. S9937-39 (daily ed. April 27, 1983) (statement of Sen. Hatch) (same).

111. *See* 28 U.S.C. § 157(a) (1998) (emphasis added).

112. *See* Nanodata Computer Corp. v. Kollmorgen Corp. (*In re* Nanodata Computer Corp.), 52 B.R. 334, 338-43 (Bankr. W.D.N.Y. 1985) (holding that state law issues normally merit "related to" jurisdiction as governed by § 157(c) of Title 11).

11.[113] With respect to non-core matters, bankruptcy judges are limited to conducting hearings for proposed findings of fact.[114] These findings are then submitted to the district courts, which are given the power of *de novo* review.[115] Over core matters, on the other hand, bankruptcy courts wield more complete jurisdiction, and although their decisions can be reviewed by district courts, review occurs only under the far more deferential standard of clear error.[116]

In some cases, bankruptcy courts can also wield this broader form of jurisdiction over non-core matters, but only if

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113. 28 U.S.C. § 157(b) states, in relevant part, that:

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

114. 28 U.S.C. § 157(c)(1).

115. *See* 28 U.S.C. § 157(c)(1); FED. R. BANKR. P. 9033.

116. *See* 28 U.S.C. § 157(b)(1).

one of two situations exists: either both parties must consent to this jurisdiction, or the relevant district court must abstain from rehearing the principal issues in the case.[117] District courts have the discretion to abstain in this manner, and by doing so, they can effectively relegate to bankruptcy courts complete jurisdiction over non-core issues.[118] In practice, district courts rarely rehear bankruptcy court determinations and, in fact, almost "every federal district in America has entered an omnibus order pursuant to 28 U.S.C.A. § 157(a) [which] refer[s] all present and future bankruptcy cases and proceedings to the bankruptcy judges of the [relevant] district."[119] This means that in practice, the same sorts of claims that were held to require Article III adjudication under *Northern Pipeline* are often adjudicated completely in non-Article III forums.

While Congress was altering the bankruptcy code to try to meet *Northern Pipeline*'s Article III challenge, the Court was re-examining Article III itself and issued several opinions that arguably expand the scope of legitimate bankruptcy court jurisdiction. First, in *Thomas v. Union Carbide Agricultural Productions Corp.*,[120] the Court reinterpreted the distinction between private and public rights, which had traditionally served as an important basis for dividing Article III from non-Article III claims.[121] Rather than limiting public rights to ones in which the government was a party to the suit, the Court held that:

> Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.[122]

Union Carbide thereby created an exception to *Northern Pipeline*'s formalistic approach to Article III not only when the government is a party, but also when the legal basis for a claim is part of a broad and complex regulatory scheme. Part of the rationale cited for this expansion was that adjudications of these sorts of rights will often demand the peculiar competence of a

117. *See* 28 U.S.C. §§ 157(c) & (d), 1334 (c).

118. The power of abstention is set forth in 28 U.S.C. § 1334(c)(1) (1994).

119. 1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 4:18 (1998).

120. 473 U.S. 568 (1985).

121. *Id.* at 593-94.

122. *Id.*

given agency, either in understanding that area of regulatory law or when a substantive policy decision had to be made.[123] In principle, this holding would thus seem to pave the way for an argument that bankruptcy courts should be able to adjudicate any claims that involve special forms of regulation for entities at or near insolvency.[124] This argument might, in turn, legitimate a broader range of bankruptcy court jurisdiction than was allowed under *Northern Pipeline*.

In the meantime, the Court also abandoned *Northern Pipeline's* formalistic approach to Article III. In *Commodity Futures Trading Commission v. Schor*,[125] the Court hearkened back to an approach much like the balancing test championed in Justice White's dissent in *Northern Pipeline*.[126] Under *Schor's* new functional approach to Article III, even non-congressionally-created rights can be adjudicated in Article I tribunals so long as the following five criteria are met: Article I adjudication is necessary to effect an otherwise valid agency scheme, the range of rights thus delegated is narrow, the corresponding legal decisions are subject to *de novo* review, the corresponding factual findings are subject to a weight of the evidence review, and the litigants are free to opt for a district court in the first instance.[127] Because this test no longer limits Article I jurisdiction to congressionally-created rights, this holding might also seem to legitimate a broader delegation of jurisdiction to bankruptcy courts than is found under the present code. The current state of the law thus demands a closer inquiry into the proper constitutional bounds of bankruptcy court jurisdiction.

II. THE HOBSON'S CHOICE BETWEEN AN EFFICIENT BANKRUPTCY SYSTEM AND AN INDEPENDENT FEDERAL JUDICIARY AND THE MOVE TO A CONTEXT-BASED APPROACH TO ARTICLE III

Together, Article III and the present bankruptcy code present a genuine dilemma. This section exposes this dilemma

123. *Id.* at 590 ("To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.") (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

124. *But see infra* Section II (discussing constitutionality of bankruptcy under *Schor* and concluding that even present scheme is arguably unconstitutional).

125. 478 U.S. 833 (1986).

126. *See* 458 U.S. at 113 (White, J., dissenting).

127. 478 U.S. at 853-56.

by showing, in Section II.A, that under the current state of the law, Article III generates unneeded and sometimes unconscionable inefficiencies in the bankruptcy context. Section II.B argues that any attempt to resolve this problem that proceeds from within the framework of Article III's current jurisprudence would threaten the independence of the federal judiciary. Because the latter value is more fundamental, the law has generally taken the former course, which represents the lesser of two clear evils. Section II.C diagnoses this Hobson's choice as deriving from an unexamined reliance on the so-called "sourcing premise," however, and develops an alternative, context-based approach to Article III that will alleviate the need to face the difficult choice in the first place.

A. Threats to Bankruptcy Policy

As discussed below, ambiguities in the Court's present Article III jurisprudence have caused many theorists and litigants to question the constitutionality of the present bankruptcy scheme. This section explores several of the challenges that have been leveled against the scheme and then develops the thesis that the primary purposes of bankruptcy law are undermined by the Code's questionable constitutional pedigree.

Generally speaking, Article III challenges to the present bankruptcy code have taken one of two basic forms. The first, which draws on *Northern Pipeline*'s approach to Article III, is perhaps the weakest but has the putative advantage of drawing on the most clearly controlling case for analyzing the constitutionality of bankruptcy court jurisdiction. As stated earlier, *Northern Pipeline* allows for wholesale exceptions to Article III in three broad classes of cases: military cases, cases brought before territorial courts and disputes involving the government as a party.[128] Modern bankruptcy courts fit none of these descriptions,[129] however, and thus *Northern Pipeline*'s analysis will not warrant a wholesale exception to Article III for bankruptcy courts.

Our present bankruptcy court does, however, allot differing

128. *See* 458 U.S. at 64-70.

129. Of course, suits where the government is a party *can* be part of modern bankruptcy proceedings. This would, however, be a contingent feature of the proceedings, and nothing about bankruptcy makes such cases more or less likely to occur than is normal.

levels of Article III review depending on whether bankruptcy courts are adjudicating core or non-core claims,[130] and one might therefore try to argue that the present code meets the standard for hybrid Article I/Article III systems set out in *Northern Pipeline*.[131] To do this, one must show that in the present hybrid system, Article III tribunals maintain jurisdiction over non-congressionally created rights and maintain at least the "essential attributes of judicial power" with regard to congressionally created rights.

The present bankruptcy code does not maintain these essential attributes. One of the essential attributes of judicial power under *Northern Pipeline* is the power to issue enforceable orders.[132] Rather than reserving this power to the Article III courts, however, the present code grants it directly to the bankruptcy courts,[133] and this power is in fact exercised in nearly every case.[134] Moreover, *Northern Pipeline* allows for only "narrow" delegations of judicial power to Article I tribunals in hybrid systems, and this narrowness requirement pertains to the type, rather than the number, of cases delegated.[135] The present code, by contrast, grants bankruptcy courts jurisdiction, in the first instance, over any claims involving a creditor that may have economic consequence on a debtor's estate.[136] These will include most private law contract and tort claims, as well as many constitutional and other paradigmatically-Article III claims. This delegation thus violates *Northern Pipeline*'s narrowness requirement.

Finally, *Northern Pipeline*'s test for the validity of hybrid systems applies only to systems adjudicating congressionally created rights.[137] All other rights must be adjudicated in the first instance by an Article III court, under *Northern Pipeline*. The present bankruptcy code, however, delegates bankruptcy

130. *See supra* notes 109-119 and accompanying text.

131. *See supra* notes 67-97 and accompanying text.

132. *See Northern Pipeline*, 458 U.S. at 85-86.

133. *See* 28 U.S.C. § 157 (allowing bankruptcy courts to issue enforceable orders when exercising jurisdiction over core matters).

134. *See* 1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 4:18 (1998).

135. *See* 458 U.S. at 63.

136. *See, e.g.*, Pacor v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) ("The . . . test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.").

137. *See Northern Pipeline*, 458 U.S. at 80-81.

courts jurisdiction over *any* claim that arises from the same factual background as those in the reorganization or dissolution in question, a delegation that will sometimes include jurisdiction over constitutional and other non-congressionally created rights.[138] If *Northern Pipeline* were to control the analysis, the present bankruptcy code would therefore be unconstitutional.

Most theorists and judges would, however, reject the contention that *Northern Pipeline* alone controls the analysis. Although the case is directly on point, and although it has not been overturned, many of its central tenets have gone through important transformations, at least in non-bankruptcy contexts, as explained above.[139] The constitutionality of the code should therefore be examined under the Court's Article III jurisprudence as modified by *Schor*[140] and *Union Carbide*.[141]

Even under these more recent rulings, the bankruptcy code faces several constitutional problems. This is because both *Schor* and *Union Carbide* expand the scope of the legitimate non-Article III jurisdiction along axes that are ultimately inapplicable to the bankruptcy context. *Union Carbide*, for example, makes an exception to Article III for claims that are highly integrated into a complex, public regulatory scheme.[142] In *Union Carbide*, the Court described its notion of "integration" as one that encompasses legal integration only, *i.e.*, as one that encompasses rights and obligations that find their source in the same type of regulatory scheme.[143] The interpretation and elaboration of these rights will often require an agency's special expertise, and the Court cited this interpretive expertise as the primary ground for the exception.[144]

By contrast, bankruptcy courts adjudicate some rights that have their source in the Constitution and state law.[145] Although these claims are sometimes "highly integrated" into the proceedings in the sense that they are factually interrelated with issues that the bankruptcy courts will ultimately determine, this factual integration is not the sort of integration

138. *See* 28 U.S.C. § 157.
139. *See supra* Section I.C.
140. *See* 478 U.S. 833 (1986).
141. *See* 473 U.S. 568 (1985).
142. *See id.* at 594.
143. *See Union Carbide*, 473 U.S. at 569, 589.
144. *See id.* at 590-91.
145. *See* 28 U.S.C. § 157.

spoken of in *Union Carbide*.[146] Consequently, bankruptcy court jurisdiction over these sorts of claims cannot be rooted in *Union Carbide*'s expanded public rights doctrine.

For similar reasons, *Schor*'s functional analysis of Article III cannot be used to legitimate the present code's jurisdiction. Although *Schor's* functional test allows Article I tribunals to adjudicate some private rights, and might thus be used to legitimate the adjudication of rights deriving from sources other than broad regulatory schemes, *Schor* also stipulates that the range of private rights so delegated must be narrow.[147] In this sense, *Schor* is very reminiscent of *Northern Pipeline*. Bankruptcy proceedings can, however, in principle incorporate any type of private claim that may have economic ramifications on a debtor's estate, and so the present code would seem to violate *Schor*'s narrowness requirement as well.[148]

One might point out that the circumstances in which bankruptcy proceedings arise are limited to situations where a debtor is at or near insolvency[149] and then argue that this limitation should provide the necessary means of narrowing what would otherwise be a wholesale redistribution of judicial power. This limitation is, however, not only dependent on changing economic circumstances but ignores the fact that *Schor*, like *Northern Pipeline*, requires narrowness in terms of type rather than number of cases adjudicated.[150] For these reasons, neither the Court's new public rights doctrine nor its new functional approach to Article III will legitimate the bankruptcy code's expanded bankruptcy court jurisdiction.

This legacy leaves an even deeper problem concerning the legitimacy of bankruptcy law from the perspective of social policy. In the bankruptcy context, where resources are scarce and often diminishing, utilitarian concerns for efficiency take on a particularly central value. Indeed, most would agree that there is good reason for bankruptcy law in general, and that there would be little justification for it if it could not efficiently

146. *See* 473 U.S. at 593.

147. *See Schor*, 478 U.S. at 854 ("[W]e are persuaded that the congressional authorization of limited CFTC jurisdiction over a *narrow class* of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers.") (emphasis added).

148. *See* 28 U.S.C. §§ 151, 157.

149. *See id.*

150. *See* 478 U.S. at 854 (limiting its holding to adjudication of a "narrow class of common law claims").

aid in reorganizing or dissolving a debtor's assets.[151] For this reason, even theorists who would otherwise reject utilitarian reasoning in the name of more agent-centered or deontological values would presumably be willing to agree that efficiency should be a hallmark concern of bankruptcy courts. For these latter theorists, efficiency could be viewed as important because it helps protect the rights of all the parties involved.

The problem with the present state of the law, then, is that it invites inefficiencies on two distinct levels. First, by leaving the proper bounds of bankruptcy court jurisdiction questionable with regard to Article III, it either invites constitutional challenges by parties seeking leverage or tactical delay,[152] or draws limits on bankruptcy court jurisdiction that are too narrow given the need for an efficient resolution of debtors' entitlements in one forum. Second, by instating the ambiguous core/non-core distinction in an attempt to meet these constitutional concerns, the present code recreates the inefficiencies of the pre-1978 plenary/summary jurisdiction distinction in a new guise. Once again, under the new code, parties seeking leverage or tactical delay can threaten to litigate the core/non-core distinction or split claims arising from the

151. *See, e.g.*, 1 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 23:5 (1997); John P. Musone, *Crystallizing the Intellectual Property Licenses in Bankruptcy Act: A Proposed Solution to Achieve Congress' Intent*, 13 BANKR. DEV. J. 509, 540 (1997) ("[E]fficiency is an increasingly important hallmark of bankruptcy law, especially since one of the chief purposes of replacing the Bankruptcy Act with the Bankruptcy Code was to make the bankruptcy system more efficient."). *But see* Robert E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 519-20 (1991) (suggesting that "the central justification for the debtor financial relief provisions of the Bankruptcy Code is founded in a natural law theory of morality."); Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1395-1424 (1985) (discussing broad range of normative theories in application to bankruptcy).

152. Some theorists have, in fact, used the above arguments to suggest the somewhat fanciful idea that bankruptcy judges simply are tenured and protected by the Constitution against salary diminution. *See, e.g.*, Hon. Leif M. Clark, 16 AM. BANKR. INST. J. 38 (1997). This argument begins with the premise that Article III is self-executing. Relying on arguments roughly analogous to the ones above, proponents of this view argue that the present bankruptcy courts already have the "essential attributes" of Article III courts. If bankruptcy courts are Article III courts, and if Article III automatically guarantees life tenure and protections against salary diminution, then by strict implication bankruptcy judges must have these protections. This theory is fanciful because it draws a conclusion that is politically unviable and relies on an outmoded analysis of Article III. Nevertheless, the theory exemplifies the type of ingenuity courts will encounter from litigants willing to exploit ambiguities in the Court's present Article III jurisprudence to undermine confidence in the scope of our present bankruptcy courts' jurisdiction.

same factual proceedings into different forums.[153] This can lead to needless and sometimes unconscionable externalities and to the systematic advantage of certain types of creditors at the creditor meetings. Thus, once again, the present bankruptcy system verges on illegitimacy from the perspective of social policy.[154]

B. Threats to the Federal Judiciary

One might try to resolve the policy problems outlined in the last section by expanding bankruptcy court jurisdiction in a manner consistent with one of the traditional approaches to Article III. This section demonstrates, however, that any such attempt would invite endless inroads into the independence of the federal judiciary.

The approach to Article III endorsed in *Northern Pipeline* is a perfect case in point. Because *Northern Pipeline* distinguished congressionally-created from non-congressionally created rights and then articulated a general test for Article III validity for hybrid systems that adjudicate congressionally-created rights,[155] there are two basic methods that one might employ to expand bankruptcy court jurisdiction under this framework. First, the Court might weaken the general requirements needed for hybrid systems to preserve "the essential attributes of judicial power" in an Article III tribunal. Although this approach would expand the limits of legitimate bankruptcy court jurisdiction, this expansion would be ineffective to meet the specific problems of bankruptcy policy elucidated above. Under the *Northern Pipeline* framework, the analysis for hybrid systems applies only to congressionally-created rights.[156] Consequently, this approach would fail to legitimate an expansion over the other types of rights that are often needed to handle bankruptcy proceedings in an efficient manner.

In order to expand the limits of legitimate bankruptcy court jurisdiction in the manner needed, the Court would thus have to

153. *See* G. Eric Brunstad, Jr. et al., *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One*, 53 BUS. LAW. 1381, 1435-40 (1998).

154. One way of getting at this point is to say that few rational creditors or debtors could consent to this bankruptcy law behind a suitably-defined veil of ignorance.

155. *See supra* Section I.B.

156. Moreover, the expansion would greatly diminish Article III courts' power over congressionally-created rights in contexts other than bankruptcy and would thus threaten some of the independence of the federal judiciary.

extend Article I jurisdiction to non-congressionally created rights, and use *Northern Pipeline's* general test for Article III validity in application to these rights. Without doubt, this approach would meet the problems of the last approach by paving an avenue for bankruptcy court jurisdiction over constitutional and state law claims. It would, however, simultaneously place *all* legal claims within the purview of Article I courts, and would thus cause a wholesale redistribution of judicial power from Article III to Article I tribunals. Because this Article III analysis would apply not only to bankruptcy but to all Article I courts, this redistribution would not only threaten but severely threaten the independence of the federal judiciary. For these reasons, neither of these expansions of the *Northern Pipeline* doctrine can be used to resolve the problems inherent in bankruptcy.[157]

Fortunately, the *Northern Pipeline* framework is not the only option, and one might try to resolve the problems elaborated in the last section by modifying the Court's present functionalist test for Article III instead. This test seems particularly well-suited to the task because it already allows for narrow delegations of judicial power to non-Article III tribunals so long as certain values are preserved, including those for: impartiality, checks and balances, separation of powers, individual rights and the narrowness of delegations to Article I forums of Article III claims.[158] To expand bankruptcy court jurisdiction, the Court need only allow for broader delegations.

This sort of approach would, however, yield several counter-intuitive results. First, contrary to the ordinary way that constitutional mandates are perceived, this approach suggests that Congress can redistribute judicial power whenever it has a strong enough interest in doing so. As noted before, however, many consider certain rights, such as constitutional and common law rights as having a deontological structure: they serve as trumps on utilitarian or majoritarian reasoning.[159] Allowing these rights to be adjudicated by institutions that are strongly accountable to the electorate whenever Congress, which is similarly accountable, thinks there is a strong enough reason

157. Perhaps because of these problems, the Court has attempted to meet the need for a stronger rationale for bankruptcy court jurisdiction by expanding the public rights exception to Article III.

158. *See generally Schor*, 478 U.S. 833.

159. *See* RONALD DWORKIN, LAW'S EMPIRE at 243-44 (1986); DWORKIN, *supra* note 11, at 96-97.

to do so would thus threaten the very status of these rights. Such an allowance would conflict with some of the central purposes behind our system of checks and balances and separation of powers.[160]

This danger is further exacerbated because under this functionalist approach, Congress could achieve a wholesale redistribution of judicial power in small stages. Although the Court's test allows only for "narrow" delegations to Article I courts, and only when Congress has an "overriding reason" for trumping Article III's ordinary concerns, these limitations only prevent Congress from generating a wholesale redistribution of judicial power by means of a single statute. Congress is in no way prevented from achieving the same net effect by creating a large number of highly specialized courts to take care of each discrete area of the law, and this problem will only be exacerbated if the analysis is allowed to validate broader delegations of judicial power to non-Article III tribunals.

Finally, the Court's functionalist approach suggests that the judicial power of interpreting the law is at its lowest, in our tripartite system, when Congress has exerted its power to make the law. To the contrary, basic conceptions of parity would suggest that the power of the United States Judiciary to interpret the law should extend as far as Congress's power to create the law.[161] The Court's present functionalist approach to Article III thus buys greater jurisdiction for Article I courts at a very costly expense and leaves endangered not only important constitutional rights but fundamental concerns about the proper structure of our federal government.

C. Diagnosis of the Problem and a Closer Look at Rights in Context

As shown in Sections II.A and II.B above, the Court's two predominant theories of Article III undermine either the power of the federal judiciary or the underpinnings of bankruptcy law

160. *See generally* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 13-17 (1990).

161. For the classic presentation of this view, see Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988). *See also* Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991); Akhil Reed Amar, Comment, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Susan N. Herman, Comment, *Why Parity Matters*, 71 B.U. L. REV. 651 (1991).

from the perspective of social policy. Indeed, the same forces that threaten the efficiency of bankruptcy courts will limit the strength and scope of the administrative state more generally because this state is dependent in large part on the ability of regulatory agencies, which are Article I institutions, to perform quasi-adjudicatory functions. These facts invite the question whether there is not some common premise running through our present approaches to Article III and whether this Hobson's choice can be avoided by challenging that premise.

There is a common premise running through these approaches. Each of the approaches to Article III examined above—that of *Northern Pipeline*,[162] the balancing approach from Justice White's dissent,[163] and the more functionalist approach outlined in *Schor*[164]—reflects what this article has called the "sourcing premise." The premise comes in a weak and a strong form.[165] In its weak form, it holds that whether an exercise of judicial power will be necessary to adjudicate a right will depend predominantly on the source of the right—whether, for example, it derives from the Constitution, from a congressional mandate or from state law. This premise is reflected in the Court's present functionalist approach to Article III, which separates congressionally-created rights from constitutional and state-law rights and allows for broader or narrower exceptions to Article III, respectively, with respect to each class.[166] In its strong form, the sourcing premise holds that the source of a right can strictly determine the outcome of the Article III analysis. *Northern Pipeline* reflects this stronger premise because it suggests that as a general rule,[167] constitutional and state-law claims must be adjudicated in Article III tribunals.[168]

This section examines the force of the sourcing premise but

162. 458 U.S. 50.

163. *Id.* at 105 (White, J., dissenting).

164. 478 U.S. 833.

165. For an example of this approach, see *Northern Pipeline*, 458 U.S. 50 (1982).

166. This approach requires an exercise of judicial power for the adjudication of constitutional and state law claims, but then allows for "narrow" delegations of this judicial power to Article I tribunals whenever the delegation will not threaten our overarching system of checks and balances. *See generally Schor*, 478 U.S. 833. The approach then allows a more wholesale distribution of jurisdiction over congressionally-created rights, so long as the rights are part of a broad regulatory scheme. *See generally id.*

167. "As a general rule" means bracketing the historical exceptions.

168. *See* 458 U.S. at 84-87.

argues that the premise ultimately rests on an overly simplified view of the relation between rights, majoritarianism and different conceptions of value. The section ends by examining the role that context can play in filling out this overly simplified picture.

1. The Sourcing Premise and Its View of Rights

In order to determine the proper role that the sourcing premise should play in our legal reasoning, it will be helpful to examine how this reasoning works, beginning with the more primary processes of moral reasoning. Consider the case of promising, which serves as the basis for one of the most fundamental types of moral claims that we make on one another. The steps that our ordinary moral reasoning takes with regard to promises can be schematized as follows:

> Moral/Normative Principle: If A promises Z to do X, then A ought to do X; or, alternatively, promises of this sort generate rights on the part of Z to have A perform X.

Factual Premise:	Person F promised G to do Y.
Application/Conclusion:	Person F ought to do Y or, alternatively, G has a right to have F perform Y.

This structure of reasoning can, in turn, be generalized and placed into a legal framework. The paradigmatic steps in our legal reasoning would then look as follows:

> Legal/Normative Principle: For all X & Y, if X has property Pa, and Y has property Pb, then X ought to perform A for Y; or, alternatively, Y has a right to have X perform A.

Factual Premise:	F has property Pa, and G has property Pb.
Application/Conclusion:	F ought to perform A or, alternatively, G has a right to have F perform A.

Viewed from this perspective, the sourcing premise seems to reflect a very powerful notion of how rights function and the role that majoritarian concerns should play in our legal reasoning. In the schematisms above, the notion of a "right" is given content by the legal principles that are articulated in the first

step of the legal syllogism. In this sense, legal principles can be said to generate the legal rights in question. Legal principles derived from congressionally-based laws are, however, thought to reflect pre-eminently majoritarian concerns, whereas principles derived from such sources as the Constitution are thought to preserve counter-majoritarian values, or values that either individuals or minority groups can assert against the majority. If, in the process of articulating or interpreting the legal principles that are binding, the institution that performs these tasks is particularly responsive to the electorate, then majoritarian concerns would seem more likely to eviscerate the values that underlie counter-majoritarian or deontological principles. By contrast, principles that are in no way deontological or agent-centered, but are simply meant to help achieve straightforward majoritarian goals, would seem to be properly articulated and interpreted by tribunals that are more responsive to an electorate. In the United States, courts have the task of interpreting legal principles in application to particular cases. It would thus appear appropriate for the courts that interpret these principles to be more or less responsive to the electorate depending on the source of the principle interpreted.

In fact, the sourcing premise also seems to take account of a rather deep distinction in the types of value that a legal system can generate. In value theory, there are generally said to be two main types of theories concerning the sources, or types, of value that are possible.[169] On the one hand, there are utilitarian theories, which define the "good" in terms of happiness, or satisfaction, and then define the "right," in terms of the good, as that principle or action that helps maximize this good.[170] Majoritarian conceptions of lawmaking seem best tailored to reflect a utilitarian conception of the good because majoritarianism attempts to calculate the maximal satisfaction across citizens and then allows the results of these calculations to determine what legal principles will be binding. Deontological theories, by contrast, define the concept of the

169. *See generally* Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL'Y 695, 705 (1997) (referencing "[t]he well-known classification of systems into consequentialist and deontological within contemporary moral and political philosophy").

170. *See, e.g.*, RAWLS, *supra* note 16, at 22-27 (defining consequentialist theories as ones in which the good is "defined independently from the right, and then the right is defined as that which maximizes the good.").

"right" as primary, and view certain principles as binding even if, as a consequence, action in accordance with those principles will sometimes lead to less than optimal satisfaction as calculated across all relevant persons.[171] By dividing jurisdiction over adjudications that involve legal principles reflecting utilitarian and deontological conceptions of value into forums that are more or less responsive to the electorate, respectively, the sourcing premise would thus appear to help foster a legal system that can generate both of these competing forms of value.

2. Some Problems with the Sourcing Premise and Its Conception of Rights

Despite the power of the sourcing premise, it ultimately pictures the relationship between rights, majoritarianism and utilitarian conceptions of the value in an overly simplistic manner. To see this will require several stages of reasoning. First, one must recognize that for the notion of an individual right to have any teeth, it must, by definition, be viewed as more than just an interest. It must amount to something that an individual right-bearer can assert to trump certain classes of countervailing interests.[172] If, however, rights must have the power to trump some utilitarian concerns, then it is difficult to understand how laws that do nothing more than reflect utilitarian concerns could ever generate such rights. By distinguishing majoritarian and counter-majoritarian rights on the basis of the difference between utilitarian and deontological conceptions of value, the sourcing premise thus makes it difficult to understand how a large class of legal rights could even function as rights.

This problem can be resolved by noting that the United States legal system contains a well-developed conception of the rule of law, and a well-developed notion that like cases should be treated alike.[173] These conceptions mandate that even if a legal

171. *See generally id.* at 30 (defining deontological theories as ones that either do "not specify the good independently from the right, or [do] not interpret the right as maximizing the good"); *see also* ANDERSON, *supra* note 19.

172. Dworkin's work best explicates the notion that for something to be a right, it must play a trump in legal reasoning. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1988).

173. *See, e.g.*, RICHARD H. FALLON, "THE RULE OF LAW" AS A CONCEPT IN CONSTITUTIONAL DISCOURSE, 97 COLUM. L. REV. 1, 3 (1997) ("Respect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of

principle is chosen or interpreted by a majoritarian institution, the principle should be given general application and should apply equally to all persons. Thus, even with regard to rights that derive from congressional legislation, a person who bears that right will sometimes be able to assert it to trump the interests of others when, for example, a uniform interpretation of the right in application to the particular case would mandate the preclusion of these other interests.

One way to clarify this point is to look at the schematisms of legal reasoning set forth above.[174] From these schematisms, it should be apparent that majoritarian concerns can affect a process of legal reasoning not only at the first step where principles are chosen and interpreted, but also at the second step where facts are determined or at the third step where the law is applied to the facts. Once this has been acknowledged, congressionally-created rights can be seen to attain their status as rights by repressing the majoritarian calculus at *the point of application*, rather than at the point of interpretation—*i.e.*, at the third step rather than the first. If majoritarianism reflects a pre-eminently utilitarian conception of value, then a new paradox will thus arise: it will seem puzzling that utilitarianism would ever allow for this sort of repression of majoritarian concerns.

Utilitarian theorists ultimately have an answer to this paradox as well, but it is one that will only further demonstrate how overly simplified the sourcing premise is. In particular, many utilitarians believe that the good of the whole is reached not by making a substantive utilitarian calculation at each point where a decision is made, but by choosing those rules that will best maximize the good of the whole and then giving these rules general application.[175] These so-called "rule" utilitarians cite three main reasons for this view. First, they point out that there are costs associated with making utilitarian calculations in the first place.[176] As these decisions become more complex and require more information and more substantive fact-finding,

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national identity."); United States v. Nixon, 418 U.S. 683, 708 (1974) (noting the United States's "historic commitment to the rule of law"); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("The rule of law . . . is the great mucilage that holds society together."); Bell v. Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting) (observing that "this country" is "dedicated" to the rule of law).

174. *See supra* Section II.C.1.

175. *See, e.g.*, Richard B. Brandt, *Some Merits of One Form of Rule-Utilitarianism*, 3 U. OF COLO. STUD. SERIES IN PHIL. 39, 58 (1967).

176. *Id.* at 39.

it can sometimes be more efficient to evaluate decisions at a general level, formulate rules, and then forego the costly decision-making process in the particular case.[177] These kinds of benefits can, in turn, outweigh the costs associated with the fact that some applications of the rule will be less than optimal.[178]

Second, there can be substantive utility in the rule of law itself.[179] The rule of law not only allows individuals to understand what the law requires and adjust their behavior accordingly,[180] it also generates greater trust in, and so potential consent to, the governing system.[181] The rule of law can thus inherit some of the value asociated with a stable social structure. Finally, with regard to large co-ordinative ventures, rules stated in general language allow individuals to understand and act upon the shared principles for action that make these ventures possible. The rule of law can thereby inherit the value associated with the possibility of these large-scale cooperative ventures. For these reasons, straightforward utilitarian reasons can be cited for repressing the majoritarian calculus when legal principles are applied to the facts in the processes of valid legal reasoning.[182]

Several points follow. First, in the process of articulating and applying the legal principles that generate congressionally-created rights, both majoritarian and counter-majoritarian incentives seem to be appropriate at different junctures. Second, utilitarian theories of value can themselves recommend both a reliance on and a suppression of majoritarian interests at different points in these processes. In no way, then, is there a one-to-one relationship between congressionally-created rights,

177. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 63 (1992) ("[R]ules promote economies for the legal decisionmaker by minimizing the elaborate, time-consuming, and repetitive application of background principles to facts.") (footnote omitted).

178. *Id.*

179. *See, e.g.*, Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

180. *See* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 242-45 (1997).

181. *Id.*

182. For utilitarian arguments in favor of the rule of law and rules, *see generally* Sullivan, *supra* note 177; *see also* Richard Tuck, *The Dangers of Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 683, 683-84 (1997) ("[O]ne of the first things that students learning about the history of ideas are taught is that the great Utilitarian philosophers were also notable fighters for a range of civil rights in their societies. Extension of the franchise, transparent government, press freedom, and *the rule of law* were all energetically championed by Jeremy Bentham and early Benthamites such as James Mill and John Austin.") (emphasis added) (footnotes omitted).

majoritarian institutions and a utilitarian conception of value—as the sourcing premise would have it.

If congressionally created rights have a less direct and straightforward relation to majoritarianism than the sourcing premise would suggest, then so too do other rights, which appear by their nature to be more strictly counter-majoritarian. These are agent-centered or deontological rights, and they normally derive from either the Constitution or the common law.[183] The distinguishing feature of these rights is that they do not merely reflect a decision that the type of right is valuable as a valuable state of affairs.[184] If—to the contrary—value were to attach to a state of affairs whenever that type of right were preserved, then it would seem to follow that the State could legitimately violate one of these rights in order to prevent a larger number of similar violations from occurring.[185] Deontological principles, however, give the duty to *each* agent, including the State, not to violate any such right, even if by doing so the agent could prevent others from violating more of the same class.[186] At first blush, deontological principles thus seem to provide an even more fundamental trump on majoritarian reasoning and one that bears no relation to utilitarian conceptions of value at all.

Non-congressionally created rights can, however, also be viewed as having a relation to majoritarianism and utilitarianism that is not obscure. This is because utilitarian theories share a common feature: namely, if belief in a particular theory of value that diverges from strict utilitarianism will increase the overall utility in a system, utilitarianism will recommend that agents adopt and believe that other theory instead of strict utilitarianism.[187] Within value theory, this phenomenon is referred to as the fact that utilitarian theories can be "self-effacing": they can recommend the adoption of decision-procedures, or rules of recognition, that do not self-consciously pursue utilitarian goals.[188]

183. *See generally* DWORKIN, *supra* note 11.

184. *See generally* ANDERSON, *supra* note 19, at 1-16.

185. In fact, some theorists have claimed that all rights must be viewed to have this sort of consequence because there can be no underlying rationale for other types of rights. *See, e.g.*, SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS 80-114 (1982) (rev. ed. 1994).

186. *See* ANDERSON, *supra* note 19, at 73.

187. *See id.*

188. This term was first introduced by Derek Parfit, but the general idea can be found even as early as Bentham. *See* DEREK PARFIT, REASONS AND PERSONS 23, 40-42

Utilitarianism can thus justify certain deviations from straightforward utilitarian reasoning,[189] and the fact that a right bears a relation to majoritarianism but also trumps the majoritarian calculus in some cases is a feature of both "countermajoritarian" and "majoritarian" rights. By attempting to divide jurisdiction on the basis of whether the source of a claim suggests that it reflects inherently majoritarian or inherently countermajoritarian concerns, the sourcing premise overlooks this complex interplay.

3. The Role that Context Plays in Determining a Claim of Right

Once one identifies the concerns that justify a move from straightforward utilitarian reasoning to rule utilitarianism, and, in turn, a move from rule utilitarianism to its self-effacement,[190] the source of a right will be seen to play only an indirect role in determining its proper place of adjudication. Naturally, certain principles will sometimes warrant presumptive treatment by one or another type of tribunal, and in such cases it may be appropriate to lay these principles down in different legal documents and create a division of institutions that have the primary responsibility for interpreting these different documents. As the considerations in the last subsection demonstrate, however, the concerns that justify placing a principle in one or another document will also warrant departures from the sourcing premise in the particular case.

One way to identify these concerns is to begin with some commonplace examples. There are numerous phenomena that show how not every interpretation of a legal right and not every application of law to the facts can constitute an exercise of judicial power. Members of the executive branch, for example, must interpret the law and apply it to the facts daily in their practices of investigation, prosecution and law enforcement. No one would, however, consider these to be exercises of judicial power, performable only by officials with life tenure and protections against salary diminution. To use a more subtle example which has sometimes been discussed, consider the case of two persons who bet on the meaning of a given federal

(1984) (defining self-effacement and demonstrating that the phenomenon arises in both self-interest theories of rationality and consequentialist theories of morality).

189. Elizabeth Anderson has argued that the scope of self-effacement has, in fact, been vastly underestimated by most utilitarian theorists. ANDERSON, *supra* note 19, at 17-43, 86-90.

190. For a description of these moves, see generally *supra* Section II.C.2.

statute. Although the bet may be construed as giving rise to a claim under state law, *i.e.*, one that will require an exercise of *state* judicial power to adjudicate, the need for an interpretation of the federal statute itself will not serve as a basis for *federal* jurisdiction over the matter. Federal judicial power is simply not exercised in deciding what the federal statute means in this kind of case because the legal consequences of the interpretation will only have effect via the state law contract claim. In both of these cases, the context in which the claim arises affects whether interpretation and application of the legal principles that give rise to the claim will require an exercise of judicial power under Article III. The role that context can play in affecting this sort of determination should therefore be scrutinized more closely.

The most obvious way to see how the context in which a right is asserted can affect the legal conclusions that should be drawn from the assertion is to look at the role that consent can play in this process.[191] Most theorists consider consent by the relevant right-holder to be sufficient to overcome the presumption reflected in a right,[192] except in the narrow class of rights that are generally called "inalienable" rights.[193] Consent, however, does not as it stands play a role in deciding how a principle should be interpreted, and so may not seem to have any valid effect on its place of adjudication. To the extent that counter-majoritarian principles are meant only to ensure fairness to an individual, however, consent to adjudication of a principle by a tribunal that is less apt to protect this value would seem to justify an abrogation of the presumption under discussion. Thus, consent to Article I jurisdiction often plays a large role in allowing for such adjudications under the Court's traditional approaches to Article III.

There are, moreover, two other important ways that context can be important in our legal and moral reasoning. First, as stated above, the context can indicate something important about the class of reasons that a claim excludes. For example, if

191. *See generally*, ANDERSON, *supra* note 19.

192. For a discussion of the role that consent plays in waiving rights in the criminal context, see William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989).

193. *See, e.g.*, Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179, 185 (1986) ("To characterize a right as inalienable is to claim that the consent of the right-holder is insufficient to extinguish the right or to transfer it to another.").

the schematisms of legal reasoning outlined in Section II.C.1 were to take place in the absence of an overarching state that could sanction individuals and enforce the judgments of the relevant tribunals, an impartial interpretation of the right would not, in and of itself, generate any guarantee of vindication. To the extent that a given right is meant to guarantee compensation in some form, no particular sort of institution would be best suited for its adjudication.

Second, features from the context can sometimes provide a sufficient reason for abrogating a given type of right. A good example of this phenomenon occurs in the case of what is commonly called "moral luck."[194] Take the example of a father who has promised both of his children that he will pick them up promptly after school, encounters problems on the freeway and is only able to pick up one on time. Both children have (moral) rights with respect to their father, which derive from the promises he has made to them. Nevertheless, the *circumstances* have prevented the father from picking up the second child, and most would agree that these particular circumstances give him a legitimate excuse, which depends on the logic of moral conflict rather than on the child's interests being somehow "outweighed." Thus, the child will, if reasonable, excuse the father's broken promise. If, on the other hand, the father had decided that he could increase overall happiness by forgetting to pick both children up and by going, instead, on a vacation to another country, both children would have legitimate (unexcused) moral claims against their father. In the first case, features about the context in which the claim arises are sufficient to warrant an excuse. In the latter, they are not.

Presently, the Court's functionalist test for Article III legitimacy allows deontological rights to be submitted to Article I forums in narrow bands whenever Congress thinks there is a strong enough reason for such a delegation. Although this threatens their status as deontological rights, which should trump majoritarian reasoning, it is the only way to delegate sufficient jurisdiction for efficient bankruptcy and agency resolutions, given the sourcing premise. The next section thus reinterprets the Court's present functionalist test in light of the context-based view of rights just elucidated, and shows that

194. For excellent discussions of this phenomenon in our moral lives, see Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS 24 (Thomas Nagel ed., 1979); Bernard Williams, *Moral Luck*, in MORAL LUCK 20 (Bernard Williams ed., 1981).

these problems can be resolved without threatening the values that are fundamental to Article III.

III. APPLICATION OF THE NEW APPROACH

Under the present four-factor test elaborated in *Schor*, courts testing the constitutionality of a given exercise of judicial power by a non-Article III court should look at the following four factors:

1. the *origins* and *importance* of the right to be adjudicated;
2. the concerns that drove Congress to depart from the requirements of Article III.
3. the *extent* to which the 'essential attributes of judicial power' are reserved to Article III courts; and
4. the *extent* to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts.[195]

Because the first factor emphasizes the origin of a right, the sourcing premise is clearly presumed in this factor.

What is less evident, but equally true, is that the sourcing premise shapes the way the rest of these values are elaborated. This is because, under the *Schor* test, the source of a right generates an initial determination as to whether it should be adjudicated by an Article I or Article III court. In order to maintain the strength and coherence of the modern administrative state, however, Article I courts must have some jurisdiction over paradigmatically Article III claims. The *Schor* test resolves this problem by reference to the other three factors, which introduce its central notion of weighing. In particular, the test allows rights that would otherwise require Article III treatment to be delegated to Article I tribunals so long as two requirements are met: Congress's reasons for delegating the right must *outweigh* the values underlying the right (see factor 2), and the *extent* to which any Article III values are disturbed must be "minimal" and must not upset our overall system of checks and balances (see factors 3 and 4). This notion of weighing majoritarian concerns against the value of certain rights in order to warrant narrow delegations of jurisdiction is thus produced in part by reliance on the sourcing premise. *Schor*'s resolution implies that counter-majoritarian rights can

195. *See Schor*, 478 U.S. at 851 (emphases added).

always be outweighed by majoritarian interests and so strips these rights of their very status and coherence.

From a context-based perspective, the values underlying Article III can be articulated in another more helpful manner, which does not allow this kind of weighing to play such a central role. Instead of the four factors above, courts might look at:

1. Impartiality, in the sense of having a right adjudicated by an institution that is disposed to interpret it correctly, regardless of the consequences of the determination to particular individuals or classes of individuals;
2. Separation of powers, which is generally given a competence rationale and is reflected in the Court's present test for the "essential attributes of judicial power";
3. Checks and balances meant to stop-gap the threat of tyranny by keeping each of the three federal branches of government from achieving undue power over the others; and
4. Narrowness of delegations, which will be important, on this version of the test, only when an Article I court can impartially interpret a right.

The first factor in this test, impartiality, mirrors the concerns in the first two factors of the *Schor* test. There are, however, some important differences. First, from a context-based view, the question of whether a tribunal can impartially adjudicate a certain type of right (*i.e.*, factor 1) will be assessed not just on the basis of where the right originates and how important it is but also in terms of the value that impartiality demands in the context where the claim is asserted. The meaning of this proposition will become clearer as the test is applied to various concrete cases below. Second, the reasons for departing from the presumed location of adjudication will sometimes be assessed not in terms of their weight but in terms of whether a distinct approach to impartiality is warranted in the particular circumstances. Factors two and three, in turn, elaborate on the concerns outlined in factors three and four of the original test, but divest them of the idea that they need to be weighed. The notion of weighing, finally, is relegated to the fourth factor. Importantly, the context-based test will allow for "weighing" and for "narrow" delegations of judicial power to Article I courts only when there are no contravening

impartiality concerns at play.

By applying this new "context-based" test to several areas of the law, the remainder of this section demonstrates how a renewed approach to Article III can not only increase bankruptcy law's viability from the perspective of social policy but offer a unified approach to Article III that preserves the independence of the federal judiciary.

A. Application to Bankruptcy

A context-based approach to Article III can, as an initial matter, help resolve some of the problems with bankruptcy court jurisdiction that have been discussed in this article. This section examines how application of each of the four factors set forth under a context-based theory of Article III would affect the scope of bankruptcy court jurisdiction.

With regard to the first value—the functionalist concern for impartiality, or fairness to the individual—the present bankruptcy code reflects the sourcing premise in its distinction between "core" and "non-core" claims.[196] As stated before, it attempts to maintain impartiality by requiring consent for the non-Article III adjudication of any claims that are "non-core,"[197] but thereby creates incentives for delay and forum-shopping and sometimes makes bankruptcy an improper vehicle to handle creditor-debtor relations at or near circumstances of insolvency. The present system also has the untoward effect of delegating small portions of what the Court holds to be judicial power to non-Article III tribunals.

Although some rights adjudicated in the bankruptcy context may be strongly counter-majoritarian when viewed from the perspective of their source alone, a context-based approach to impartiality will yield helpful insights as to how they might otherwise be viewed. This approach begins by noting a fundamental intuition concerning particularities of the bankruptcy context. In ordinary circumstances, where resources are relatively plentiful, a correct or impartial determination of a given claim to those resources is important because the parties can thereafter invoke the mechanism of the state to enforce the entitlement. The goal of impartiality is thus essentially tied to the goal of compensation, and the fairness of the compensation will in turn depend on one's ability to obtain the amount owed.

196. *See* 28 U.S.C. § 157.

197. As noted, however, this two-tier schema is something of a fiction in practice.

In these ordinary circumstances, rights deriving from the Constitution or state law may thus warrant adjudication by an institution with few majoritarian ties because the rights themselves are more likely to be interpreted correctly by a tribunal that has some measure of independence from majoritarian influences.

If, however, the goal of impartiality is closely tied to the goal of compensation, the notion of impartiality should not be construed to produce requirements that would undermine a party's chances of obtaining this compensation. This creates a problem in the bankruptcy context because, here, legal rights are under the threat of extinction. Each creditor thus bears the risk of receiving nothing back on her claim, and this risk is only increased in the absence of an efficient bankruptcy mechanism. Because correct determinations may turn out to be unenforceable in this context, correctness takes on a very different value in relation to efficiency.

It follows that the desire for impartiality may take on a very different shape inside and outside of the bankruptcy context. Arguably, if the state were to adjudicate a right in the former context, and then parcel out resources on the basis of this determination, a lack of impartiality could be construed as an unconstitutional taking once the state mechanisms were put into play to enforce the determination. In the latter case, however, there can be no taking by the government. There is only misfortune and the question of who should bear its risk. Moreover, bankruptcy law mitigates the threat of loss to all involved, and thus helps to preserve the expected value of all legal rights involved. A bankruptcy system is in fact justified only insofar as it can help mitigate these losses. Because bankruptcy law can mitigate these losses only on the condition that it functions efficiently, bankruptcy is one of the few contexts where efficiency helps meet the Article III concern for fairness to the individual.

With respect to contract creditors, consent to non-Article III jurisdiction can also be viewed as arising out of the creditor-debtor relation itself. As stated before, the context-based theory views rights as presumptions that can generally be rebutted by the consent of the relevant right-holder.[198] This consent need not, however, occur at the time of the bankruptcy proceedings themselves. One might, for example, argue that Article I

198. *See supra* Section II.C.

jurisdiction over claims arising at or near insolvency should be granted by default, and then allow parties to contract around this default rule if they make their intentions explicit in the original loan. Under such a rule, creditors would automatically bear the risk of the enterprise's failure, and failure to contract around the rule would be interpreted as a form of consent. Once the rule was known, however, creditors would presumably pass the costs of these risks off to debtors in the form of increased premiums, and in practice most creditors would also diversify their risks so as to shoulder them better than any independent debtor.

Although this view depends on the parties' freedom to contract and requires a distinct volitional act, a stronger view that applies outside of contract can be constructed on its basis. In particular, one might argue that consent to Article I jurisdiction should be gleaned from the circumstances of insolvency as an immutable rather than as a default rule. As such, the rule would be viewed as one that cannot be contracted around by the parties at all, and so need not be limited to claims that rest on the parties' ability to contract.

There are several possible rationales for this stronger view. One might argue that it is justified by the fact that the state has the power to set this term as a condition of its enforcement of contractual relations in general. Alternatively, one might argue for this view on the ground that any other rule would allow for the threat of unconscionable conduct on the part of some creditors at the point of insolvency. Perhaps the strongest reason for adopting this view derives from political theory, however. Political theory often distinguishes between "actual" and "hypothetical" consent in order to clarify that consent need not always be actual to rebut the presumption of a right-holder.[199] Whereas the notion of actual consent requires a voluntary act on the part of the individual, hypothetical consent models require only that a reasonable person under certain idealized epistemological circumstances—*e.g.*, a person choosing from behind a "veil of ignorance," which severely limits one's knowledge of one's particular circumstances—would have

199. *See, e.g.*, Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2305 (1992) (distinguishing between actual and hypothetical consent); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1823 (1991); Daniel P. Brudney, *Hypothetical Consent and Moral Force*, 10 LAW & PHIL. 235 (1991).

consented to rebut the presumption reflected in a right.[200]

This notion of hypothetical consent is important because creditors seeking to split claims in a bankruptcy proceeding are generally seeking unfair advantages that they can only obtain because of the particularities of their situation in relation to the debtor and other creditors. Behind a veil of ignorance, these creditors would, however, not be able to know whether they would be one of the few who could take this unfair advantage. These creditors would thus opt for rules that prevent these sorts of activities, and Article I jurisdiction might be justified on the ground that an ideal creditor behind a veil of ignorance would consent to the jurisdiction in disputes involving a party in bankruptcy. Even without a "core/non-core" distinction,[201] and even without individual consent to bankruptcy court jurisdiction at the time of the actual proceedings,[202] bankruptcy law can thus be viewed as meeting Article III's concern for individual fairness from a context-based view.

For similar reasons, a delegation of jurisdiction to bankruptcy courts over state and constitutional claims arising at or near insolvency can be viewed as consistent with Article III's concern for separation of powers. Before proceeding, it is important to distinguish between "separation of powers" and "checks and balances." Under the Court's present functionalist approach, these concepts are sometimes conflated because a system is often deemed to separate powers properly whenever the three federal branches of government can check the others' excesses. This conception of separation of powers is, however, incorrect as a description of our constitutional practice. Our Constitution appears to give specific powers to the different branches,[203] which suggests that it would not tolerate just any division of power that evades the threat of tyranny. Rather than conflating these two values, it is thus better to require that the "judicial power" reflected in the term "separation of powers" extend, at minimum, to the paradigmatic judicial acts of interpreting and applying the law. Then the separation of powers concept would suggest that any acts of interpreting and applying federal law should be presumed, in the first instance, to lie within the province of an Article III tribunal.

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200. This notion of hypothetical consent is framed in John Rawls's work. *See generally* RAWLS, *supra* note 16.

201. *See* 28 U.S.C. § 157.

202. *See* 28 U.S.C. § 157(c)(2).

203. *See* U.S. CONST. arts. I-III.

This presumption can, however, be rebutted whenever the context in which the legal claim arises possesses features that either would make an exercise of judicial power irrelevant or unwarranted or would undermine the very conditions of judicial power. For the same reasons discussed in examining impartiality from a context-based perspective, actual or hypothetical consent to Article I jurisdiction when interpreting legal principles involving a bankrupt party can thus be gleaned from the bankruptcy context, where rights are already under the threat of extinction. This context provides a rationale for pitting utility over more strictly deontological values that even a deontological theorist might accept, and an expanded bankruptcy court jurisdiction is consistent with Article III's separation of powers concerns.

The system of bankruptcy can also be seen to meet Article III's concern for checks and balances under a context-based approach to Article III. As Justice White has pointed out, the cases that come into bankruptcy courts are rarely very politicized, at least with respect to divisions between the three federal branches of government.[204] In fact, no one has seriously entertained the idea that bankruptcy jurisdiction alone constitutes an encroachment that is likely to lead to tyranny in the United States. Rather, the predominant fear is that this encroachment is part of a larger movement, which will take large amounts of power away from the judiciary by divesting it of jurisdiction in small stages. Once the separation of powers criterion is understood from a context-based perspective, however, an expanded bankruptcy court jurisdiction can no longer be viewed as a delegation of power that threatens this larger slide. This is because it is particularities of the bankruptcy context, rather than weighty majoritarian impulses, that require Article I tribunals to adjudicate many of the different sorts of claims that arise in bankruptcy proceedings. These particularities are, however, specific to bankruptcy and will not warrant similar moves in other legal contexts. Perhaps more importantly, the reasons for this exception do not entail a similar exception whenever utilitarian concerns would demand one, and so do not threaten the status of any deontological rights in question. The weighing factor, which was so central to the *Schor* test, does not play any role in the present analysis.

This last move should make the final feature of the *Schor*

204. *Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting).

test—the narrowness requirement—irrelevant as well. As stated above, the narrowness requirement should raise suspicion not only because it is vague, but because it raises the specter of a piecemeal erosion of the judicial power of the United States as Congress creates a series of highly specialized Article I tribunals that take away the judiciary's tasks one at a time. If bankruptcy is viewed from a context-based perspective, however, increased jurisdiction is consistent with the maintenance of complete judicial power in Article III forums. The context-based view is thus special because it allows space for increased bankruptcy court jurisdiction to be carved out in a principled manner without threatening the independence of the federal judiciary.

B. Application to Military Courts, Territorial Courts, and Courts Deciding Public Rights

As shown in Section III.A, the context-based approach to Article III can be used to allow for a wider range of bankruptcy court jurisdiction than is possible under the present bankruptcy code and under present constitutional law. This section explores the question of whether this new approach can also provide a unifying explanation of the traditional exceptions to Article III in the cases of military courts, territorial courts and courts deciding public rights. In the process, it attempts to shed light on the proper limits of the modern administrative state.

1. Military Courts

That the sourcing premise has loomed large in the history and development of the Article III exception for military courts is clear from the history of the subject. Military courts, or "courts-martial," as they are sometimes called, are Article I courts that have existed since the founding of this country and have handled a large range of military adjudications.[205] Presently, military judges enjoy fifteen year terms and have no guarantees against salary diminution.[206] Although these courts lack Article III protections, their constitutionality was upheld as early as 1858 in *Dynes v. Hoover*,[207] at a time when courts-

205. *See* Middendorf v. Henry, 425 U.S. 25, 49 (1976) (Powell, J., concurring) ("Court-martial proceedings, as a primary means for the regulation and discipline of the Armed Forces, were well known to the Founding Fathers.").

206. U.C.M.J arts. 67, 142; 10 U.S.C. §§ 867, 942 (Supp. IV 1992).

207. 61 U.S. (20 How.) 65 (1857).

martial had the statutory power to address only issues concerning the punishment of "military crimes," which included crimes such as desertion and mutiny.[208] Since then:

> Congress has steadily expanded the subject-matter jurisdiction of military courts: first, in 1863 to all common law felonies committed by military personnel in wartime, then, in 1916 to all felonies except murder and rape committed [by servicepersons] during peacetime in the continental United States, and, finally in 1951 to all felonies committed [by military personnel] in wartime or peacetime.[209]

This expansion of military court jurisdiction to rights that originate in sources other than the military code caused the Court great concern shortly after this last expansion. In 1969, the Court adjudicated the constitutionality of this expansion in *O'Callahan v. Parker*.[210] Noting that military courts are "singularly inept in dealing with the nice subtleties of constitutional law,"[211] the Court formulated what is now known as the "service-connection test" for legitimate military court jurisdiction.[212] Under this test, military courts could be denied Article III status so long as their jurisdiction was limited to offenses "relating to the military."[213] Although the scope of the phrase "relating to the military" was unclear, the test in practice excluded most violations of laws other than those finding their source in the military code. The test thus reflected the sourcing premise in a rather strong form.

As soon as *O'Callahan* was issued, the service-connection test came under sharp criticism from both judges and scholars, who viewed it as placing undue limits on a type of jurisdiction that had traditionally been excepted from Article III requirements altogether.[214] In 1987, the Court responded to

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208. *See* An Act for the Better Government of the Navy of the United States, ch. 33, 2 Stat. 45 (1800); An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, 2 Stat. 359 (1806).

209. Note, *Military Justice and Article III*, 103 HARV. L. REV. 1909, 1915 (1990) [hereinafter *Military Justice*].

210. 395 U.S. 258 (1969).

211. *Id.* at 265.

212. *See generally*, Donald T. Kramer, Annotation, *Courts-Martial Jurisdiction Over Members of Armed Forces for "Civilian" Offenses*, 14 A.L.R. FED. 152 (1973).

213. *See id.* at 163.

214. *O'Callahan* was first criticized in dissent by Justice Harlan and then provoked a series of scholarly criticisms. *See* John F. O'Connor, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177, 245 (1997) (citing Robinson O. Everett, O'Callahan v. Parker, *Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853 (1969); Grant S. Nelson & James E. Westbrook, *Court-Martial Jurisdiction Over Servicemen for*

these criticisms by reverting to a test that allows military courts jurisdiction on the basis not of the origin or type of crime committed but of the status of the accused–and, in particular, on the basis of whether the accused was part of the military when the crime was committed.[215] Many have argued that this sort of delegation violates the Court's present test for Article III validity,[216] however, because it allows military courts to adjudicate a host of rights that derive from outside the military code. Although the proper limits of military court jurisdiction are far from clear, the history of this jurisprudence shows that the Court has been concerned about allowing constitutional rights and other deontological rights to be adjudicated by military courts but has ultimately been unwilling to let the source of the right be the final arbiter of jurisdiction. The Court has not, however, had a principled alternative at its disposal.

A context-based theory can provide this alternative and can thereby yield a better perspective on the proper limits of military court jurisdiction, both as a descriptive and as a normative matter. The theory explains, for example, why the status of a service-person might influence the determination with respect to the Article III value of impartiality. The military is an organization that is built to protect the foundations and coherence of our ongoing status as an independent country,[217] and this implies the protection of a common goal and potential sacrifice of individual interests to that goal.[218]

Service-members are, in turn, either volunteers or draftees.[219] If they are volunteers, their entry into the service can be viewed as an act of consent, which places the service-

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"Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 MINN. L. REV. 1 (1969); Ronald L. Wilkinson, *The Narrowing Scope of Court-Martial Jurisdiction:* O'Callahan v. Parker, 9 WASHBURN L.J. 193 (1969); Peter W. Bowie, Comment, O'Callahan v. Parker: *Sounding the Death Knell of Military Justice?*, 7 SAN DIEGO L. REV. 55 (1970); John F. DePue, Comment, O'Callahan *and its Progeny: A Survey of Their Impact on the Jurisdiction of Courts-Martial*, 15 VILL. L. REV. 712 (1970); Don A. Wetzel, Comment, O'Callahan v. Parker, *A Military Jurisdictional Dilemma*, 22 BAYLOR L. REV. 64 (1970); David F.P. O'Connor & Teresa M. Schwartz, *Recent Decisions: Military Law*, 38 GEO. WASH. L. REV. 170 (1969-1970)).

215. *See* Solorio v. United States, 483 U.S. 435 (1987).

216. *See, e.g., Military Justice, supra* note 210, at 1918.

217. *See, e.g.*, Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 193 (1998).

218. *See* S. REP. NO. 103-12, at 272 (1993) (discussing the need for members of military teams to make sacrifices for the good of the whole).

219. *See* Thomas W. Ross, *Raising an Army: A Positive Theory of Military Recruitment*, 37 J.L. & ECON. 109, 109 (1994).

members' individual goals into service of the whole. If, on the other hand, service-members are draftees, then drastic circumstances have come into play, circumstances that may affect the ongoing coherence of the state. Without a state, there would be no apparatus to protect deontological rights in the first place, and in these circumstances, consent to service can thus be inferred from those features that constitute hypothetical consent in general. Although deontological rights normally serve as trumps on utilitarian reasoning, consent to Article I adjudication of these claims can sometimes be gleaned from the military context.

With regard to separation of powers and checks and balances, military court jurisdiction also seems to be relatively unproblematic. In the processes of ordinary government, the basic separation of powers goals are met when there is a parity among the three branches, such that the legislative branch makes the law, the executive branch enforces the law, and the judicial branch interprets the law.[220] The command of an army by the President, however, which is a power expressly granted to the Executive Branch by the Constitution,[221] takes place predominantly by executive order rather than by law,[222] and so military regulation represents a sphere to which these traditional concepts of parity do not apply. As long as the army is limited to that branch of our armed forces that is manned for the protection of the country,[223] its regulation by an Article I tribunal will thus not infringe upon the constitutionally required tripartite division of federal government in the case of ordinary governing and law-making.

A context-based rationale for military court jurisdiction would, finally, also place some important limits on that jurisdiction. Ordinarily, consent can only be used to waive rights that are alienable. To the extent that military court

220. *See generally* Samuel C. Kaplan, *"Grab Bag of Principles" or Principled Grab Bag?: The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 463-64 (1998).

221. *See* U.S. CONST. art. II, § 2, cl. 1.

222. At various times, the Department of the Army has adopted explicit procedures for implementing these executive orders. *See, e.g.*, 32 C.F.R. §§ 651.34-.40 (1990) (implementing Exec. Order No. 12,114, 3 C.F.R. 734 (1961-1981), *reprinted in* 42 U.S.C. § 4321 app. at 515 (1982)).

223. Moreover, the conditions under which an army can be created are limited to volunteering and drafting: only consent or necessity can validate military jurisdiction over a person. Because neither condition obtains in the ordinary state of government, neither will unduly affect the checks and balances necessary to maintain a proper separation of powers in ordinary government.

jurisdiction rests on actual consent, it should thus never be viewed as extending to fundamental rights like the rights to equal protection or to be free from deprivations of life, liberty or property without due process of law in peace time. Similarly, even consent derived from circumstances requiring more dire military action is most plausibly viewed as consent to jurisdiction regarding crimes committed while in the role of a service-person or adjudicated during the crisis.[224] In cases of extreme necessity, where Article III values cannot be maintained without putting the nation's concern as an ongoing entity at stake, even inalienable rights might be adjudicated legitimately in military tribunals on the theory that the power that protects those very rights is at stake. In practice, these sorts of cases should be extremely rare. Thus, a context-based perspective can illustrate why there has traditionally been an Article III exception for military courts while simultaneously helping clarify how to draw proper limits on that exception.

2. Territorial Courts

This article will not attempt to provide a systematic review of all the many possible forms of territorial courts, sometimes referred to as "Article IV courts,"[225] that have existed. Some common features run through almost all of them, however, and these features will be important for the purposes of this article. Almost all territorial courts are, for example, created pursuant to an act of Congress,[226] almost all have subject-matter jurisdiction that is at least as broad as that of Article III courts[227] and almost none are granted the tenure and protection against salary diminution prescribed by Article III.[228] As one commentator has noted:

> the constitutional and legal status of the United States Territories and affiliated states is a matter of major importance to this entire

224. Although one might consent to further jurisdiction, there seems to be no good reason to presume such consent. It might even be unconscionable for the Army to ask for it in some drafting circumstances, given persons initial bargaining positions.

225. *See* Freytag v. Commissioner, 501 U.S. 868, 913 (1991) (Scalia, J., concurring in part and concurring in judgment) (stating that territorial courts "are neither Article III courts nor Article I courts, but Article IV courts").

226. *See* Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 383-84 (1991).

227. *See* Burkeley N. Riggs & Tamera D. Westerberg, *Judicial Independence: An Historical Perspective*, 74 DENV. U.L. REV. 337, 349 (1997).

228. *See* Palmore v. United States, 411 U.S. 389, 400 (1973).

> country and its legal community. For one thing, nearly four million people, most of them United States citizens, nationals or persons under the protection of the United States, live in those areas and their ranks are increasing rather than diminishing.[229]

Still, the Court has always excepted territorial courts from Article III in some manner, and a context-based approach can explain and refine this exception.

With regard to impartiality, there are two main features of the territorial context that may excuse Article III guarantees for the adjudication of certain paradigmatically non-majoritarian rights. First, because no independent state government precedes and subsists through the act of Congress that creates the territory, no state court system is in place in the territories.[230] In the United States, however, Article III courts are courts of limited subject matter jurisdiction and only state courts have general jurisdiction.[231] Ordinarily, territorial courts must therefore play a hybrid state-federal role if they are to fulfill all the roles needed by a judiciary.

This dual role is, in fact, indicative of a deeper distinction between territorial courts and federal courts within the United States: territorial courts are often created by treaty, and aid in the government of countries that have not consented to, and are not fully incorporated into, American government.[232] Therefore, constraints on the legitimate form of courts and government instituted often derive from agreements between the preceding local government and the United States and from settlements relating to foreign policy, rather than from fundamental structural concerns concerning the United States' internal self-government. Even when United States law applies in a territory, the degree to which a territory respects rights as having a deontological status will thus depend on features of that territory and on its autonomous conception of government. In creating a treaty with the United States, it would be possible for the individuals, through their preceding local government, to

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229. Laughlin, *supra* note 227, at 388-89.

230. *See* 72 AM. JUR. 2D *States, Territories, and Dependencies* § 159 (1974) ("The powers . . . exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively coextensive with and correspondent to that of the state courts.").

231. *See* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE §§ 2.1-2.4 (3d ed. 1985).

232. This is the case, for example, with the territorial courts of American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. *See* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 243, 250 (1998).

consent to an alienation of the deontological status of all but their inalienable rights.

Separation of powers and checks and balances concerns also seem to drop out in the territorial context. Because territories are not fully integrated into the United States, they are best viewed as foreign entities that have enlisted American aid in an unusually dependent manner for a terminable period of time.[233] In this sort of context, the domestic notion of separation of powers will have no application, and foreign conceptions of how to divide power may come to the forefront. In fact, insofar as power is allocated to any domestic branch of government in territorial matters, it is given to Congress by the Constitution.[234] Thus, assuming that the United States government maintains the proper checks and balances domestically, there should be no threat of this sort of congressional power upsetting this appropriate checks and balances.

These remarks suggest that Article III's values can coexist with Article I territorial courts so long as Article I jurisdiction over legal matters is limited to the territories, so long as inalienable rights are guaranteed, and so long as these Article I courts are prevented from adjudicating claims that are predominantly domestic in nature. In fact, the present jurisprudence concerning territorial courts mirrors just these requirements. Under the so-called "incorporation doctrine," as expressed in *Downes v. Bidwell*,[235] constitutional values are fully applicable to the territories only if those territories have been suitably "incorporated" into the United States.[236] Fundamental, or inalienable, rights are nevertheless guaranteed even in unincorporated territories.[237] This suggests, finally, that a system of territorial courts would retain the "essential attributes of judicial power"[238] if it allowed Article III review of territorial

233. The case of the North Mariana Islands is a case in point. *See* Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold*, 22 HASTINGS CONST. L.Q. 707, 756 (1995).

234. *See* U.S. CONST. art. IV, § 3, cl. 2.

235. 182 U.S. 244 (1901).

236. *See id.* at 285-87.

237. For example, "[p]laces subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words, are recognized by the provision of the Thirteenth Amendment to the United States Constitution, prohibiting slavery within the United States 'or any place subject to their jurisdiction.'" 72 AM. JUR. 2D *States, Territories, and Dependencies* § 138 (1974) (citation omitted).

238. *Northern Pipeline*, 458 U.S. at 81.

adjudications of fundamental rights but allowed Article I jurisdiction over any other rights.

3. The "Public Rights" Doctrine

For the purposes of this article, the most important exception to Article III derives from the public rights doctrine. This exception, which, in its present form, allows administrative agencies to adjudicate rights that derive from broad regulatory schemes,[239] has in fact been expanded greatly in the last two decades and is considered by many to be an important linchpin in the administrative state.[240]

From a context-based perspective, the source of a right in a broad regulatory scheme would be insufficient to warrant wholesale jurisdiction over it in an Article I forum. Within the public rights doctrine, three distinct types of public rights can, however, be distinguished, and each should be analyzed separately from a context-based perspective. First, there are public rights that involve suits between the government and a party, and for which sovereign immunity genuinely applies.[241] In this class of cases, the public rights exception would seem to apply because the context gives the government the power to abstain from being sued altogether. Consequently, it should have the power, deriving from its status, to attach this condition to its being sued. The only conditions that would be intolerable would be those that asked individuals to alienate fundamental rights, and Article III jurisdiction—perhaps in the form of Article III review—should thus be maintained over these core rights.

Second, there are public rights that are part of broad regulatory schemes and require agency expertise for their interpretation.[242] In such cases, it seems that the essential properties of judicial power should still be vested in a federal court because these decisions are in principle nothing more than interpretations of the law.

Finally, there are rules that are parts of broad regulatory

239. *See Schor*, 478 U.S. at 857.

240. *See, e.g.*, Judith Resnik, Symposium, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2610-11 (1998).

241. This is the kind of public rights that the plurality in *Northern Pipeline* discussed most fully. *See* 458 U.S. at 67-71.

242. These are the kinds of public rights addressed squarely in *Schor*. *See* 478 U.S. at 845.

schemes in a more refined sense. These are rights that derive from rules that do not have the full status as law but are instead merely procedures implemented by the executive branch to carry out its internal affairs.[243] In these instances, rights deriving from these broad regulatory schemes are neither deontological nor rule utilitarian, but possibly strictly utilitarian, and their interpretation may be vested solely in an Article I tribunal. A context-based view of public rights would thus allow for strict delegations of adjudicatory power to Article I courts only in limited circumstances but would allow adjudications of a broader class of rights, in the first instance, if the rights derive from a broad regulatory scheme. This perspective would therefore recommend only minor changes in the Court's present jurisprudence.

More importantly, however, the context-based view can now be seen to warrant exceptions to Article III in precisely the same circumstances as warranted by history. This fact provides a strong reason for accepting the view as a viable and principled "unified approach to Article III," which has been so often sought by the courts.

C. CONCLUSION

As many commentators have noted, the Court's present Article III jurisprudence is a particularly confused and unprincipled area of the law.[244] This article has argued that this confusion stems in large part from two seemingly conflicting interests: (1) giving certain courts, like bankruptcy courts and administrative agencies, increased jurisdiction for the sake of efficiency[245] while (2) preserving the independence of the federal judiciary and the counter-majoritarian values it protects.[246] This article has argued that the sense of paradox between these two goals, as well as many of the unworkable attempts to resolve it, derives from an unexamined reliance on the sourcing premise.[247] Although this premise has deep roots in political

243. Executive orders are a good example of this sort of phenomenon, as are some of the internal rules and regulations that govern, for example, internal INS procedure.

244. *See, e.g.*, *Schor*, 478 U.S. at 847 (noting that the Court's "precedents in this area do not admit of easy synthesis"); Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel of NAFTA*, 13 INT'L TAX & BUS. LAW. 101, 115 ("Article III jurisprudence has been a somewhat confused area of constitutional law.").

245. *See supra* Section II.A.

246. *See supra* Section II.B.

247. *See supra* Section II.C.

theory and captures something important about how the texture of a right can be linked to the processes by which it is enacted, this premise is only part of the story about how rights function.

More generally, this article has demonstrated how a limited or one-sided understanding of certain basic concepts, *e.g.*, of rights, can operate to blind legislators and judges to important avenues of legal reform. This blindness occurs because key doctrines are formulated in ways that are shaped by how these primary concepts are framed. Often, however, these more primary concepts have not been subjected to extensive reflection, and a primitive understanding of them can narrow the forms the doctrines themselves will take. After reflecting on these concepts and paying closer attention to how some of them function in our ordinary moral practices and discourse, legal officials can therefore free up options that are not readily apparent.

In the present instance, this process has, for example, helped produce a unified approach to Article III that both explains and refines the current delegations of judicial power to non-Article III forums such as bankruptcy courts. It has also helped indicate that broader or narrower jurisdiction may be appropriate in certain critical areas. The process has done more than just this, however. If philosophy is reflection on ordinary language and on its foundational principles, then this article has helped show that there is a valid place for philosophy in the articulation and interpretation of the law. This role should not be very surprising: philosophy can help clarify the law's foundations, thus allowing it to develop without the obstruction of conceptual frameworks that are ultimately extrinsic to its subject.